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SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LXIV.

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PRACTICE REPORTS.

SUPREME COURT.

THE MARKET NATIONAL BANK OF NEW YORK agt. THE PACIFIC
NATIONAL BANK OF BOSTON, MASSACHUSETTS.

National bank — Foreign corporation — Domestic corporation — National banks, domestic corporation, within the meaning of the Code — When attachment against national bank without the state should be maintained — Burden of showing insolvency of such bank on defendant — Code of Civil Procedure, sections 1216, 1217, 635, 707.

A national bank, organized under the laws of congress and located within this state, is, within the meaning of the Code, a domestic corporation. and may sue here a national bank without the state, or any foreign corporation, for any cause of action.

Where it is contended that, at the time of the issuing and levy of an attachment against a national bank without the state, such bank was insolvent, the burden of showing that it was insolvent at that time is upon the defendant; and that fact should be made clearly to appear or else the attachment should be maintained.

Special Term, September, 1882.

MOTION to set aside attachment, levy, judgment and execution.

Wakeman & Latting, for plaintiff.

Vanderpoel, Green & Cuming, for defendant.

HAIGHT, J. — This motion was brought to recover the amount of five certificates of deposit issued by the defendant, and now held by the plaintiff, amounting to the sum of \$25,393.47. An attachment was issued and levied upon the property of the defendant in the city of New York. An order of publication of the summons was obtained, and the summons was served personally without the state. Judgment

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was entered July 6, 1882, for the amount of such certificates and costs. The defendant now moves to vacate the judgment, the execution, the warrant of attachment and the levy made thereon.

This action is brought to recover a sum of money only; the summons was served without the state. The defendant did not demand a copy of the complaint, or plead. In such cases no judgment could be rendered, except in an action where a warrant of attachment against the property of the defendant has been issued and levied upon property (*Code, secs. 1216, 1217, 635 and 707*). It therefore follows that in case the attachment is set aside, all the proceedings following must fail.

It is contended that the plaintiff and defendant are both foreign corporations, and that the plaintiff being a foreign corporation is not authorized by the Code to bring this action. The plaintiff and the defendant are incorporated under an act of congress. The legislature has defined a domestic corporation to be a corporation created by or under the laws of the state, or located in the state, and created by or under the laws of the United States, or by or pursuant to laws in force in the colony of New York before the 19th day of April, 1775. Every other corporation is a foreign corporation (*Code, sec. 3343, sub. 18*).

The plaintiff, being located in this state and organized under the laws of congress, must therefore be regarded as a domestic corporation within the meaning of the Code. Section 1780 of the Code provides: "An action against a foreign corporation may be maintained by a resident of this state or by a domestic corporation for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident in one of the following cases only: First. Where an action is brought to recover damages for a breach of contract made within the state, or relating to property situated within the state at the time of the making thereof," &c.

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I have not been furnished with a copy of the complaint in this action, but the moving affidavits on the part of the defendant state the cause of action to be to recover the sum of \$24,390, with interest, as damages for non-payment by defendant of certain evidences of indebtedness, which were alleged to have been made and issued by the defendant, to be payable on demand. The failure to pay the certificate on demand was a breach of a contract, and I fail to see why the cause of action is not one provided for by this section of the Code.

It is contended, further, that at the time of the issuing and levy of the attachment on the 19th day of November, 1881, that the defendant was insolvent and that the attachment was, therefore, prohibited by section 5242 of the United States Revised Statutes.

This section of the statutes was construed by the court of appeals in the case of *Robinson agt. The National Bank of Newberne* (reported in 81 N. Y., 385-392; S. C., 59 How. 18). It was there held that the statute applied only to such national banks as were insolvent. It therefore becomes important to determine whether or not, at the time of the issuing and levying of this attachment, the defendant was insolvent. It appears from the affidavits that on the day preceding the issuing and levying of the attachment, the eighteenth of November, one Daniel Needham, a bank examiner, under the direction of the Hon. John J. Knox, comptroller of the currency, took possession of the bank and made an examination and reported to the comptroller of the currency in reference to its affairs. For some time thereafter the bank remained in charge of the examiner; but subsequently, and on the 14th day of March, 1882, the comptroller of the currency, after the examination as to its affairs, concluded that it was solvent and authorized its board of directors to again open the bank and commence business. The bank thereupon resumed business and continued until May 20, 1882, when it went into liquidation and a receiver was appointed. During this time upwards of

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\$2,000,000 of the assets of the bank were disposed of in the payment of its creditors in full.

I have carefully been through these figures presented by the several reports of the examiner to the comptroller of the currency, statements made by its board of directors, &c., upon the 18th day of November, 1881, the 11th day of March, 1882, March 14, 1882, and the report bearing date July 11, 1882. It would appear from the last report that many of the assets depreciated in value, and that portions of the bills receivable were uncollectible. But I am not satisfied, from the affidavits presented, that this was the case on the 18th of November, 1881. The burden of showing that the bank was insolvent at that time is upon the defendant. That fact should be made to clearly appear or else the attachment should be maintained. The board of directors, the examiner and the comptroller of the currency, after a careful examination, all agreed that the bank was solvent. The fact that the bank, months afterward, had to suspend and go into liquidation, standing alone, I do not regard as sufficient to authorize a finding that they were mistaken.

I regard the equities of the case as being with the plaintiff. A large sum of money, in the neighborhood of \$2,000,000, has since the levy been paid out. Had the bank at that time gone into the hands of a receiver the plaintiff would, with other creditors, have been entitled to have shared according to the amount of its claims in this fund, of which it is now deprived.

I am of the opinion that under all the circumstances of the case the motion should be denied.

Stringham agt. Steuart.

SUPREME COURT.

THOMAS H. STRINGHAM agt. CORNELIA M. STEUART.

Negligence — Master and servant — When master not liable for injuries to a servant occasioned by the negligence of a co-employee.

The plaintiff, who was a servant of defendant, was injured by the falling of an elevator used to hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised.

Held, that the defendant was not liable for such neglect of a co-employee of plaintiff.

Second Department, General Term, September, 1882.

W. L. Whiting, for plaintiff.

H. H. Rice, for defendant.

BARNARD, *P. J.* — The only question in this case is whether a master is bound, in furnishing machinery, to provide against the neglect and inattention of the employees who operate it. The plaintiff was a servant of the defendant upon her farm in Queens county. The farm is very large, and in order to elevate the grain into the storage building there was provided an elevator which lifted up a car with about a ton weight of grain by means of a steam engine in a building near to the storehouse. The engineer in charge was enabled, by marks upon the belt, to stop the elevator at the proper floor. There were only six or eight inches between the top of the elevator and the pulley block at the upper story when the elevator was even with the floor. The car was run from the elevator upon a tramway to the end of the storehouse. Upon the occasion of the accident the elevator was intended to deposit the car at the upper story.

Stringham agt. Stuart.

For some unexplained reason the elevator stopped short of the elevation needed. It then started again, and the elevator was carried the six or eight inches too high, and the rope broke and precipitated the elevator to the bottom of the building, and injured the plaintiff severely. The cause of the accident was solely occasioned by the failure to stop the engine at the proper mark upon the belting, and thus arises the question whether the plaintiff was bound to allow more than six or eight inches for a possible neglect. It does not seem that such a principle has been established. As between master and servant, the master is to furnish good and suitable machinery (*Cone agt. D., L. and W. R. R. Co.*, 81 *N. Y.*, 206). The servant takes the risks of the machinery, if the defects are known to him or should be known to a person of ordinary intelligence in his situation in reference to the machinery (*Wright agt. N. Y. Central R. R.*, 25 *N. Y.*, 562; *Gibson agt. Erie R. R. Co.*, 63 *N. Y.*, 449). When the machinery is defective no action lies by the servant against the master when the injury was occasioned not by the defect of the same but by the negligence of a co-employee of the servant (*Wright agt. N. Y. Central*, 25 *N. Y.*, 562). The master is not bound to furnish the best and safest known appliances for the purpose, provided the means used are safe. The sole occasion of this accident was the negligence of the engineer in not stopping the elevator. Against such negligence there can be no provision; as well continue the application of the power for feet as inches. The rope could not resist the steam engine, and was not intended to do so. The contrivance was sufficient, if properly managed, and for this neglect the defendant was not liable. The judgment should therefore be reversed and a new trial granted, costs to abide the event.

DYKMAN, J., concurs.

The People *ex rel.* Clarke agt. Clarke.

SUPREME COURT

THE PEOPLE *ex rel.* CLARKE agt. CLARKE.

Habeas corpus—Application—How and to whom made—Code of Civil Procedure, section 2017.

Under the Revised Statutes, a justice of the supreme court had power to allow the writ of *habeas corpus* in whatever part of the state the prisoner might be detained.

Under the Code of Civil Procedure, a justice of the supreme court in any part of the state may issue the writ.

Special Term, September, 1882.

ON a hearing upon the writ of *habeas corpus* obtained by Mrs. Mary A. Clarke to compel her husband, Octavius H. E. Clarke, to give to her the custody of her son, Stuart Clarke, fifteen years old, Mrs. Clarke says that while her son, who was living with her in this city and attending school, was out upon an errand he was kidnapped by his father, aided by a detective, and forcibly taken to Troy, where Mr. Clarke resides.

The preliminary objection was made, on the part of Mr. Clarke, that the judge had no jurisdiction to grant a writ of *habeas corpus* in New York directed to a person in another part of the state.

LAWRENCE, J. — The preliminary objection raised by the defendant's counsel upon the return to this writ must be overruled. It was held by Mr. justice HARRIS, in the case of *The People on the Relation of Bently agt. Hanna* (3 How. Pr., 39), that, under the Revised Statutes, a justice of the supreme court had power to allow a writ of *habeas corpus* in whatever part of the state the prisoner might be detained; and the learned justice refers, in his decision, to the case of *Woodruff agt. The People*, decided by Mr. justice WILLARD,

Hickey agt. Schwab.

and also to the case of *The People agt. Mercin* (8 Paige, 55). The two thousand and seventeenth section of the Code of Civil Procedure is the same, in substance, as the provisions of the Revised Statutes relating to the writ of *habeas corpus*, with the exception that the phraseology of the statute has been so far altered as to make it perfectly clear that a justice of the supreme court in any part of the state may issue a writ of *habeas corpus*. That it was the design of the commissioners to clear up any obscurity which arose from the language of the Revised Statutes is asserted by the commissioners in the note to section 2017 of the Code.

N. Y. COMMON PLEAS.

JOHN HICKEY, plaintiff, agt. JOSEPH SCHWAB and others,
defendants.

Mechanics' lien—Law of 1880, not applicable to New York city—Chapter 379 of the Laws of 1876, the only lien law applicable to New York city.

The mechanics' lien law of 1880, applicable to all of the cities of the state of New York, except the city of Buffalo, does not apply to the city of New York, and the local act of 1875 (*chap. 379 of the Laws of 1875*), is the only lien law applicable to said city of New York.

Where a general law is passed which, but for the existence of a local act, would be held to apply to the city of New York, it will not, in the absence of express intention to repeal the local act, be held applicable to that locality.

Held, that a mechanics' lien filed for work performed on property in the city of New York, in accordance with the act of 1880, does not create a lien.

Special Term, September, 1882.

Sidney H. Stuart, for plaintiff.

Samuel Utermeyer, for defendant.

Hickey agt. Schwab.

VAN HOESEN, J.—It is conceded that under the act of 1875, the notice of claim is fatally defective, but it is asserted that though bad under the act of 1875, it is good under the act of 1880. The question, therefore, is directly presented: Is the act of 1880 in force in the city and county of New York?

It is useless for me to discuss the matter, for the decision of the general term, in *McKenna* agt. *Edmonstone*, is, as I understand it, directly in point. That decision holds that the law of 1875 is still in force in New York; and if it be so, it must be because the act of 1880 was not intended to apply to this city.

The act of 1880 is obviously designed to provide a system complete in itself, and to repeal all former statutes relating to mechanics' liens in those localities in which it was intended that two systems, absolutely inconsistent with each other, should be in force in one place at the same time. But that would be the effect of holding that the act of 1880 and the act of 1875 are both in operation in the city of New York.

If the act of 1875 is in force, as the general term have held, the act of 1880 cannot apply to the city of New York. The act of 1875 is, as the general term hold, a local act, applicable to the city of New York alone, and, therefore, was not repealed by the act of 1880, which is a general act, applicable everywhere save those places for which special local laws have been passed. It does not contain any words showing an intention to repeal the special statute that was made for the city of New York.

The complaint must be dismissed, with costs.

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Webb *et al.* agt. The Mayor, &c., *et al.*

SUPREME COURT.

WILLIAM H. WEBB *et al.* agt. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK *et al.*

Constitutional law — So much of chapter 456, Laws of 1881, for the removal of the Forty-second street reservoir as provides for the conversion of the land into a public park, is unconstitutional — That part relating only to the removal, cannot be saved because standing alone. New York, city of — State no power to take away the city's vested rights of property. .

So much of chapter 456 of the Laws of 1881, for the removal of the Forty-second street reservoir, in the city of New York, as provides for the conversion of land into a public park, is unconstitutional, because it is in violation of the third article of the state constitution, which declares "that no private or local bill which shall be passed shall embrace more than one subject and that shall be expressed in the title." So much of the act as relates only to the removal of the reservoir cannot be saved, because, standing alone, it merely orders, without cause, the destruction of valuable property, and hence is not in the line of legitimate and intelligent legislation.

The corporation of New York, by virtue of its ancient charters, confirmed by the constitution, is the owner in fee simple of the lands in question, and the legislature has no power to order the demolition of the structure thereon, except for public purposes and upon making just compensation. Though doubtless competent, when the British rule ceased, for the state to take away from the city of New York its property rights and privileges, yet not having done so, and having recognized such rights by the Constitution of 1777, and having become amenable to the provisions of the Constitution of the United States of 1787, by which it was prohibited to pass any law impairing the obligations of contracts, it is not competent for the state, under cover of exercising political powers, to take away the city's vested rights of property. Such rights are as indestructible by legislative act as are the property rights of citizens.

Special Term, September, 1882.

Coe & Potter, attorneys.

*John F. Dillon, Edward Fitch and Elliot Sanford, of
counsel for plaintiffs.*

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William C. Whitney, counsel to the corporation.

David J. Dean, Joshua M. Van Cott, W. Hartwell and Chas. B. Hart, for defendants.

MACOMBER, J.—The plaintiffs bring themselves within the provisions of chapter 531 of the Laws of 1881, entitled "An act for the protection of taxpayers," by which persons who are taxpayers in municipal corporations may bring and maintain actions to prevent the officers of such corporations from executing or performing illegal acts.

The object of this action is to restrain the defendants from carrying into effect the provisions of chapter 456 of the Laws of 1881, on the ground that such act is unconstitutional. That law is entitled "An act for the removal of the reservoir situate in the city of New York, between Fortieth and Forty-second streets." By the first section thereof the reservoir is declared to be abandoned, and the commissioner of public works of the city is directed, within six months from the passage of the act, to remove the pipes which connect with the reservoir and to lay a main in Fifth avenue, between Fortieth and Forty-second streets, so as to connect the mains now leading in and out of the reservoir. By the same section the commissioner is directed to remove the structure and grade the ground now occupied by the reservoir to the level of the adjacent streets in a suitable manner for the purpose of a park, all of which is to be accomplished within a year from the passage of the act.

By the second section the cost and expenses of the removal of the pipes and the laying of the new main are directed to be raised by tax upon the real and personal property of the city which may be included in the tax levy of the years 1881 and 1882. The cost of removal of the structure and of grading the ground occupied by it is directed to be paid by the owners of property bounded by the westerly side of Sixth avenue and southerly side of Thirty-seventh street, and easterly side of Madison avenue and the northerly side of Forty-fifth street.

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By the third section the comptroller of the city was authorized to pay the cost and expenses of the improvement, and in order to make the same he was authorized and empowered and directed to issue revenue bonds of the city, which should bear such a rate of interest as the comptroller should deem proper, not exceeding, however, six per cent per annum, which should be sold at not less than par.

By the fourth section the land occupied by the reservoir, together with the adjacent land lying west thereof known as Reservoir square, was directed to be converted into a public park to be laid out by and under the control and management of the park commissioners, and kept and maintained by them as one of the public parks of the city of New York.

The fifth section prohibited the use of such park for military parades, drills, inspections or reviews of any kind.

It is claimed, and I think justly, that the act in question is unconstitutional because it was passed in violation of the sixteenth section of the third article of the constitution of the state, which declares "that no private or local bill which shall be passed shall embrace more than one subject, and that shall be expressed in the title." By the title of the act the only subject mentioned is the removal of the reservoir, while the body of the act itself, though providing for such removal, is directed mainly to the establishment of a public park in the city of New York. Undoubtedly if the act had been entitled "An act for converting the reservoir into a public park," the demolition of the structure itself might have been necessarily implied by the very terms of the act. But the converse of this is by no means true. So far as the title of the act informs us the ultimate purpose for which the structure should be removed might be the erection of a government building or the parceling out of the land among the adjacent owners.

But it is contended, on the part of the defendants, that though the act may be unconstitutional and void in so far as it attempts to establish a public park, yet it may be saved for the purposes for which it is properly entitled. It is true that

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a portion of the act follows legitimately its title, and hence if the mere destruction of the masonry composing the reservoir was in the line of legitimate legislation, the act would not be open to this objection. The general rule that that portion of a statute which is constitutional shall be saved though a part of it is unconstitutional admits of this qualification, namely, that the legislation shall seem, upon its face at least, to be proper and intelligent. This is so stated by judge COOLEY in his work on Constitutional Limitations, in language, adopted in the court of appeals in the case of *The People agt. Briggs* (50 *N. Y.*, 566), as follows: "But if the act is broader than the title, it may happen that one part of the act stand because indicated by the title, while as to the object not indicated by the title it must fall. Some of the state constitutions, it will be observed, have declared that this shall be the rule; but the declaration was unnecessary, as the general rule that so much of the act as is not in conflict with the constitution must be sustained would have required the same declaration by the courts. If by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional. The principal questions in each case will therefore be whether the act is, in truth, broader than the title; and if so, then whether the other objects in the act are so intimately connected with the one indicated by the title that the portion of the act relating to them cannot be rejected and leave a complete and sensible enactment which shall be capable of being executed."

The passage quoted has special application to this case. Without the provisions relating to a public park, and the means of paying the expenses of making the same, no intimation of which is made in the title of the act, there remains only the statute enacted for the purpose of the destruction of valuable property. No claim is made that the reservoir is a nuisance, in that its maintenance may endanger life, limb

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or health. It does not, therefore, come within the rule above stated, that the part of the act which may be saved from this constitutional objection shall be intelligent, or, as judge COOLEY puts it, "sensible." Suppose, for instance, that the act had required the commissioner of public works of the city of New York to demolish the statuary in Union square, could it be claimed that the act was in the line of legitimate legislation and intelligent? Clearly it could not. This is by no means a technical objection. A constitutional objection cannot be technical. In civil cases there are no degrees in offenses against the organic law.

I am, therefore, of the opinion that the act in question is open to the objection that it is contrary to the constitutional provision above referred to, and that for this reason the defendants should be restrained from carrying its provisions into effect.

But a more interesting question is presented by the claim made in behalf of the plaintiffs, that the act is unconstitutional because it violates the rights of property of the city of New York. The land which is covered by the reservoir, together with the land west of it known as Reservoir square, was granted in fee simple to the city by what is known as the "Dongan charter," in 1686. That charter is substantially embraced in the Montgomerie charter, so called, of 1730. The third section of the Dongan charter is as follows: "And I do by these presents give and grant to the said mayor, aldermen and commonalty of the said city of New York, all the waste, vacant, unpatented and unappropriated lands, lying and being within the said city of New York, and on Manhattan island aforesaid, extending and reaching to low-water mark, in and by and through all parts of the said city of New York and Manhattan island aforesaid, together with all rivers, rivulets, coves, creeks, ponds, waters and water courses in the said city and island, or either of them, not heretofore given or granted by any of the former governors, lieutenants or commanders-in-chief, under their or some of their hands and seals, or

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seal of the province, or by any of the former mayors or deputy mayors and aldermen of the said city of New York." By the sixth section it is provided that "the mayor, aldermen and commonalty of New York be and shall be forever hereafter, persons able and in law capable to have, get, receive and possess lands, tenements, rents, liberties, jurisdictions, franchises and hereditaments to them and their successors in fee simple or for a term of life, lives or years, or otherwise. * * * And also to give, grant, let, set and assign the same lands, tenements, hereditaments, goods and chattels; and to do and execute all other things about the same, by the name aforesaid."

The same power is reiterated and restated in the twelfth section and in the fourteenth section. The same rights were restated in the thirty-sixth and thirty-seventh sections of the Montgomerie charter. The last charter was confirmed by the colonial legislature in 1732, and again by the constitutions of 1777, of 1821, and of 1846.

The lands in question, therefore, are owned by the city in fee simple absolute. This was so held in the case of *Furman agt. New York* (5 Sandf. [S. C.], 16), and in the same case (10 N. Y., 567). If, therefore, the legislature has undertaken by its acts to destroy the property of this corporation, or to deprive the city of its use, without just compensation, it has violated a fundamental law of the state. Chancellor KENT (*City Charter in Kent's Notes*), in commenting upon the provisions of the ancient charters of the city, says: "It may not be amiss to state here, once for all, that it is an acknowledged and settled principle that no vested right of property, whether it belongs to private individuals or be in the shape of a corporate franchise, can ever be lawfully taken away without some default or forfeiture to be ascertained by a fair trial and pronounced by judicial decree. The English statute of *Magna Charta* establishes as a great principle the sanctity of rights and privileges then existing or thereafter to be lawfully procured; and that principle was intended to be of general and

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perpetual application. It provided that the city of London, and all other cities, should have all their liberties and free customs; and that no freeman should be disseized of his freehold or liberties, or free customs but by lawful judgment of his peers or by the law of the land. Corporate franchises in this country rest on a basis which ought to be at least as solid as *Magna Charta*, for they are founded on grants which are contracts, and 'no state,' says the Constitution of the United States, 'can pass any law impairing the obligation of contracts.'"

I perceive no difference between the tenure of property thus held by the city and the proprietary rights of natural persons or private corporations. This privilege, however, is peculiar in this state to the city of New York. Its corporate name is the same that it has had for upwards of two hundred years, long antedating the organization of the state as an independent political entity. And while it was doubtless competent, when the British rule ceased, for the state to take from the city of New York its property rights and privileges, as an episode of the revolution, it is sufficient to say that it did not see fit to do so. Having once recognized such rights by the organic law of 1777, and having become, ten years afterwards, amenable to the provisions of the Constitution of the United States, by which it was prohibited to pass any law impairing the obligations of contracts, it is not, in my judgment, competent for the state; under cover of exercising political powers, to take away from the city any vested rights of property. It seems to me that such rights are as indestructible by legislative act as are the property rights of citizens.

Nor is this property, with other real estate owned by the city, held in trust for any person, nor is it stamped with any mere political trust of which the city may be deprived and thus its claim to the right to the possession of the property destroyed. The title to the land rests somewhere, and, as has been shown above, so far as the records extend, no one claims it except the city itself. No one has been in possession of it except the city. So that no necessary rights have been

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acquired by any person adverse to the city. Hence I say that the complete title of the city to the lands in question is not merely inferentially saved, but is expressly saved to the city by the thirteenth section of article first of the state constitution, which says that "the entire and absolute property is vested in the owners according to the nature of their respective estates." The idea of a trust under such circumstances, it seems to me, involves a contradiction in terms. How can a trust be attached to a title in fee simple of land? In trust for whom? If for anybody other than municipal corporation, it would be the inhabitants of Manhattan island. But the mayor, aldermen and commonalty, the entity which owns the title of the real estate, are the people of Manhattan island. The owner, then, and *cestui que trust* are the same, and that a person should hold anything in trust for himself is a legal solecism.

It seems to me that the weight of authority is to the effect that the property which New York holds in its proprietary or private character, though originally derived from the power claiming the ultimate title, and which concerns the private advantage of the corporation, as a distinct legal personality, is stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of this reservoir without due process of law and without just compensation. It admits of no doubt that the legislature may change, modify, enlarge or restrain the powers of a corporation which it has created. But whenever this is done, and a municipal corporation is relieved of the privilege and duty of maintaining a jurisdiction over the property and property rights, care has invariably been taken to restore to the original owner or proprietor the rights which the municipal corporation were for a time permitted to exercise (*Ferret agt. Taylor*, 9 *Cranch*, 52; 2 *Kent's Commentaries*, 257; *Dartmouth College case*, 4 *Wheat.*, 694; *People agt. Detroit*, 28 *Mich.*, 228; *Bailey agt. Mayor, &c., of New York*, 3 *Hill*, 531; *People agt. Fields*, 58 *N. Y.*, 591; *People agt. Ingersoll, Id.*, 1; *Maxmillian agt. New York*, 62 *N. Y.*, 160).

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Mr. justice COOLY's language in the *Detroit Park* case is: "The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity as well as to corporations for manufacturing and commercial purposes; and when a local convenience or need is to be supplied, in which the people of the state at large, or any portion thereof outside of the city limits, are not concerned, the state can no more, by process of taxation, take from the individual citizens the money to purchase it than they could, if it had been procured, appropriate it to the state use. To this extent the corporate rights appear to us to be a clear and undoubted exception to the general power of control which is vested in a state." The court there held that the city of Detroit had a right to decide for itself whether or not it would purchase a public park, and that an act to compel the city to purchase it against its will was held to be unconstitutional. See, also, *Montpelier* agt. *East Montpelier* (29 Vt.), where ISHAM, J., says: "It has uniformly been held that towns and other public corporations may have private rights and interests vested in them under their charter, and as to those rights they are to be regarded and protected the same as if they were the rights and interests of individuals or private corporations; and grants of property in trust for other than corporate and municipal use (that is, as we understand for private as distinguished from public purposes) are no more the subject of legislative control than are the private and vested rights of individuals (See, also, *Savings Society* agt. *Philadelphia*, 31 Penn. St., 183; *People* agt. *Bachelor*, 53 N. Y., 128, 141; *Bailey* agt. *Mayor and Aldrich* agt. *Tritt*, 11 R. I., 141; *Weisner* agt. *Village of Douglass*, 64 N. Y., 91).

The learned counsel for the defendants do not claim that the legislature may deprive the city of property which it owns in fee, but they argue that the legislature may direct what use such property shall be put to by the city, and may prescribe

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what department of the corporation shall manage it. Within certain limits this contention may be conceded to be correct. Indeed, in the exercise of its superintending and governmental powers, as *parens patriæ*, the legislature doubtless may designate the particular instrument in the varied and somewhat complex machinery of this vast municipality, for discharging its duties and for the protection of its rights. But I cannot assent to the proposition that the state may, absolutely and unqualifiedly, direct the use which shall be made by the city of its property held in fee when the use named, by necessary intendment, and the mode adopted of changing an old public use to another, involves a denial of all the essentials entering into proprietorship.

The case of *Darlington* agt. *The Mayor, etc.* (81 N. Y., 164), decided only the question which was before the court, namely, that the act of 1855, for compensating parties whose property may be destroyed in consequence of mobs or riots, was constitutional, and that judgments rendered against the city of New York for such cause have the same force against the property of the city as judgments rendered for any other cause of action. It seems to me, regarding only the thing there actually adjudged, instead of this being an authority against the relief sought by the plaintiffs, that it is directly in the line of the views hereinbefore expressed, because it decides that the property which the city holds as proprietor, or absolute owner, is liable to satisfy judgments against the city, while the property held for strictly public uses is not. It is frequently said that the power to alienate property is a test of ownership; but it is hardly as certain a test as the liability of that property to be taken away, in *invitum*, by execution.

The other cases cited by the defendant's counsel, though involved in one way or another in the question so elaborately argued, do not, in view of the grounds selected for my decision, require special comment.

Judgment must be ordered for the plaintiffs.

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SUPREME COURT.

SAMUEL W. MILBANK *et al.* agt. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE BUFFALO, NEW YORK AND ERIE RAILROAD COMPANY, HUGH J. JEWETT, receiver, *et al.*

Railroad corporation — its rights as to the purchase of the stock of other corporations.

Though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its corporate funds in the purchase of the stock of another corporation is not necessary in the exercise of any of its corporate powers, and is unauthorized and in violation of the statute and is consequently *ultra vires*.

While a railroad corporation remains the owner of the stock of another corporation it may collect and receive dividends thereon, and has the right to sell and dispose of the same, but has no right to vote thereon; and the stockholders of the company, whose stock is thus held, have the right to have the company holding such stock enjoined from so voting, in case it threatened to do so.

Erie Special Term, October, 1882.

C. H. Daniels, Edward Robinson and John Clinton Gray, for plaintiff and Buffalo, New York and Erie Railroad Company.

J. C. Kilburn and E. C. Sprague, for New York, Lake Erie and Western, and Hugh J. Jewett, receiver, &c.

HAIGHT, J. — This action was brought by the plaintiffs, who are the owners of forty-nine shares of the capital stock of the Buffalo, New York and Erie Railroad Company, on behalf of themselves and the other stockholders, to restrain and enjoin the New York, Lake Erie and Western Railroad Company,

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its agents, officers and directors, from voting at any meeting of the stockholders of the Buffalo, New York and Erie Railroad Company for the election of directors or otherwise. The Buffalo, New York and Erie Railroad Company is a corporation organized in the year 1857, and now existing under the laws of the state, for the purpose of constructing and operating a railroad from the city of Buffalo to the village of Corning. On or about the 27th of February, 1863, the Erie Railway Company entered into an agreement in writing with the Buffalo, New York and Erie Railroad Company, by which the latter leased and rented to the Erie Railway Company its real estate, road-bed, rolling stock, branch tracks, property, &c., for the period of 490 years, at an annual rental of \$233,100. At various times during the years 1873 and 1874 the Erie Railway Company purchased 5,759 shares of the capital stock of the Buffalo, New York and Erie Railroad Company, being more than one-half of all of the capital stock of such company, and paid for the same out of its corporate funds. Subsequently, and in the year 1878, all the property and franchises of the Erie Railway Company were sold under a decree of this court on foreclosure of a mortgage on such property to the defendant the New York, Lake Erie and Western Railroad Company. By such sale the New York, Lake Erie and Western Railroad Company claims to have become the owner of the 5,759 shares of the stock of the Buffalo, New York and Erie Railroad Company, and threatened to vote thereon at the next meeting of such corporation for the election of directors.

There is no conflict as to the facts. In the first place it becomes important to determine whether or not the purchase of the stock of the Buffalo, New York and Erie Railroad Company by the Erie company was *ultra vires* and against public policy. Section 8 of chapter 140 of the Laws of 1850, being the general railroad act, provided that "it shall not be lawful for such company to use any of its funds in the purchase of any stock in its own or any other corporation." It is contended, however, that this provision did not apply to

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the Erie Railway Company. The New York and Erie Railway Company was organized under chapter 224 of the Laws of 1832, and was authorized to construct a railroad from New York city, through the southern tier of counties, to the shore of Lake Erie, at some eligible point between Cattaraugus creek and the Pennsylvania line. Various amendments were enacted prior to 1848, but in none have I found any provisions prohibiting corporations from purchasing stock in other corporations.

In 1848 the general railroad act was passed (*See chap. 140*). Section 11 contained the same prohibition contained in section 8 above quoted. Section 46 provides that "all existing railroad corporations within this state shall, respectively, have and possess all the powers and privileges, and be subject to all the duties, liabilities and provisions contained in this act," &c. So that, under this section, the New York and Erie Railroad became bound by the provisions of section 11, and was expressly prohibited from purchasing the stock of another corporation. This chapter, together with the acts amending the same, were, however, repealed by section 50 of the general railroad act of 1850. After the repealing clause it contained the following: "But all railroad companies formed under said act are hereby continued in existence, in the same manner as if said act were not repealed, and such companies shall be subject to all the provisions and shall have the same powers, rights and privileges, and be subject to the same duties, as if they had been incorporated under this act." It will be observed that this saving clause only extends to railroad corporations "formed under this act." While the New York and Erie Railroad existed and did business under the act and was bound by its provisions, still it was not formed under it and is therefore not covered by the saving clause. Section 49 of the general act of 1850 provides that certain sections shall apply to existing railroad corporations, but fails to mention section 8.

It is quite possible that it was an oversight on the part of

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the legislature in failing to provide that section 8 of the general act of 1850 should apply to existing railroads, or in failing to embrace them in the saving clause in repealing the act of 1848. Certainly there appears to be no reason for continuing the prohibition clause as to all railroads formed after 1848, and repealing it as to those previously formed. It consequently becomes necessary to consider the question at common law and under the general statute. In England there appears to be some conflict in the authorities; but in the United States, Green, in his American notes of Brice's *Ultra Vires*, page 95, says: "Corporations cannot purchase or hold, or deal in stock of other corporations, unless expressly authorized to do so by law."

It has been held that a railroad corporation cannot lease its road bed, rolling stock and franchises unless authority is expressly given, and such leases, if made, would be *ultra vires* and void (*See Thomas agt. Railroad Company*, 101 U. S. R., 71; *Troy and Boston Railroad Co. agt. Boston, &c., Railroad Co.*, 86 N. Y., 107; *see, also*, 80 N. Y., 27; 77 N. Y., 232). In the case of *Talmage agt. Pell* (7 N. Y., 328) it was held that a bank corporation has no power to purchase the stocks of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt. In the case of *The Mechanics' Mutual Savings Bank agt. The Meridian Agency Company* (24 Conn., 156) it was held that a company organized to do a general insurance agency, commission and brokerage business has no power to subscribe to the stock of a savings bank and building association. In the case of *The Central Railroad Company agt. The Pennsylvania Railroad Company* (21 N. J. Eq., 475) it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporator under the general railroad law. In the case of *Berry agt. Yates* (34 Barb., 200) it was

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held that an insurance company has no power to subscribe to the capital stock of another insurance company. In the case of *Hazelhurst agt. Savannah Railroad Company* (43 Georgia, 57) it was held that if one railroad buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter. This cannot be done by any implication; the power to do so must be clearly expressed. In the case of *The Central Railroad Company agt. Collins* (40 Georgia, 583) it was held that the power to buy and hold real and personal property and make contracts is confined to such property and such contracts as are incident to building, managing and maintaining the railroad; that the purchase of stock in another railroad is outside of the objects of the charter.

In this state there is a statute which appears to me to control the question. Section 1, title 3, chapter 18, part 1 of the Revised Statutes in substance provides: "Every corporation, as such, has power—first, to have succession by its corporate name for the period limited in its charter, and when no period is limited perpetually; second, to sue and be sued; third, to make and use a common seal; fourth, to hold, purchase and convey real estate; fifth, to appoint subordinate officers and agents; sixth, to make by-laws." Section 2 provides: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated." Section 3 provides: "In addition to the powers enumerated in the first section of this title, and to themselves expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given" (*See, also, Colby's N. Y. Railroad Laws, sec. 115, and authorities therein cited*). In the case under consideration the right to purchase stock is not expressly given, and it is not claimed that the purchase of the

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stock in question "was necessary to the exercise of the powers enumerated and given."

The Erie Railway Company was organized under chapter 160 of the Laws of 1860 and chapter 119 of the Laws of 1861. As such corporation it purchased all the rights, property and franchises of the New York and Erie railroad under a decree in foreclosure. Under these statutes it appears that the Erie Railway Company possessed the same powers, and was subject to the same duties and liabilities as the New York and Erie Railroad Company, and no others. One had no more right to purchase stock in another corporation than did the other. It was under this state of the law that the Erie Railway Company purchased the stock in question. The conclusion that I have reached is, that such purchase was not necessary in the exercise of any of its corporate powers; that it was unauthorized and in violation of the statute, and was consequently *ultra vires*. I do not understand this conclusion to be in conflict with the authorities which hold that a corporation may take title to all kinds of personal property to secure debts due it, created in lawful and legitimate business. The collection of such debts is among the powers given by the statute, and is necessary in the exercises of its corporate franchises. But collecting debts and investing its corporate funds are quite different acts.

In the second place it becomes necessary to determine what, if any, title the New York, Lake Erie and Western Railroad Company have acquired to the stock, and what power it possesses over the same. In February, 1874, and subsequent to the purchase of the stock in question, the Erie Railway Company executed to the Farmers' Loan and Trust Company, as trustees, a mortgage to secure debts then owing, such mortgage covering all its property and franchises, including these shares of stock. The New York, Lake Erie and Western Railroad Company was organized under the general railroad law of 1850, and chapter 430 of the Laws of 1874, as amended by chapter 446 of the Laws of 1876. As

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such corporation it purchased all of the property, rights and franchises of the Erie Railway Company under a decree made upon the foreclosure of the mortgage. Section 1, of chapter 446, among other things, provides that "the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before said sale by the corporation whose property shall have been sold as aforesaid."

It is contended that under this statute the New York, Lake Erie and Western Railroad Company's title to such stock becomes absolute and perfect, notwithstanding the fact that the purchase by the railway company was unauthorized and against public policy. It is true that this statute authorizes the new corporation to take, hold and possess the property included in the sale, but do these words of the statute change the character of the ownership from what it was under the old corporation? It held and possessed the title to the stock; it collected semi-annually the dividends accruing thereon. If a stockholder of that corporation had applied seasonably to the court it would have been restrained from paying out the corporate funds in the purchase of such stock. No action, however, was taken on the part of the stockholders; the corporation was permitted to purchase the stock and pay for it with its corporate funds. The money cannot be recalled. The stockholders having rested upon their rights until the purchase was consummated, cannot be heard to complain; notwithstanding the fact that such purchase was unauthorized and in violation of its charter.

By this statute the legislature intended to transfer this stock into the hands of the new corporation, and it does not appear to me that it was the legislative intent to invest the new corporation with any greater, different or other title than that

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possessed by the old corporation. This, appears to me, must have been the intention of the legislature from the clause of the statute which follows: "And shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale, by the corporation whose property has been sold as aforesaid." That is, the new corporation has the rights and power over this stock which was possessed by the old corporation before the sale. Again, it appears to me that it could not have been the intent of the legislature to deprive other persons not interested in the old or new corporation so formed, of any rights or remedies which they may have had in reference to such stock; as, for instance, if the Buffalo, New York and Erie Railroad Corporation or its stockholders were injured or prejudiced by the voting upon such stock by the Erie Railroad Company, and were entitled to commence an action to protect themselves from injury, which might result from such voting, it does not appear to me that it was the intention of the legislature to deprive them of such remedy by authorizing a transfer of this property to the new corporation.

This brings us to consider in the third place, whether or not the Buffalo, New York and Erie corporation or its stockholders, the plaintiffs in this action, have such a standing in court that they can demand the relief prayed for. As I have before stated, the time has passed in which the stockholders of the Erie Railway Company could be heard to complain. The Buffalo, New York and Erie or its stockholders were not interested in the corporate funds of the Erie Railway Company, and the paying out of such funds in the purchasing of stock, although illegal and unauthorized, did not prejudice or injure such corporation or stockholders. The mere taking title to, the holding of the stock and the collection of the dividends thereon, as they may accrue from time to time, work no injury to the Buffalo, New York and Erie Railway Company or its stockholders, and consequently they have no cause for complaint. It is only when the New York, Lake

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Erie and Western Railroad Company seeks to vote upon the stock, and thereby obtain control of the corporation, that such corporation or its stockholders can be prejudiced. No offer was made to vote on this stock while it was held by the Erie Railway corporation; it was not until after it had been purchased by the new corporation that the attempt to vote on it was made. The question thus presented is somewhat serious and important. I have been unable to find any reported case in which this question appears to have been squarely decided. The new corporation, the New York, Lake Erie and Western Railroad Company, has been organized under the general railroad law, and is now bound by section 8 of that statute.

It appears to me that the reason for the prohibiting of the purchasing of stocks in other corporations both under section 8 of the general railroad act and section 3 of the Revised Statutes, referred to, are twofold. First. It is against public policy to permit the officers of a corporation to take the corporate funds belonging to the stockholders and expend it in purchasing or speculating in the stocks of other companies. In the second place, it is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock. Green in Brice's "*Ultra Vires*," at page 604, under the head of "Proceedings by Third Parties," says: "The whole of the law, in so far as the present subject is concerned, may be summed up in the two statements: First, that as no person can institute legal proceedings on account of illegal acts, however great their detriment to the public or to others than himself, whether to obtain damages for them or to restrain their repetition, unless he has been personally damnified, so neither can he do so if the acts are *ultra vires* of a corporation instead of a private individual. Secondly, if on the other hand a private person be wronged by such acts, he may in every case sue for damages or to restrain them, and that, although the matter complained of would not have been

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a tort if done by an ordinary citizen. In a word, torts committed by a corporation stand, as regard legal proceedings by aggrieved parties in respect thereof, in exactly the same position as torts by private persons, with the single qualification arising from the doctrine of *ultra vires*, that every act directed or concurred in by a corporation in excess of its powers will, if it causes harm to any third party, be a tort, and give to such party a right of action.

In the case of *The State ex rel. The Attorney-General agt. McDaniel et al.* (32 Ohio, 354-368), a question was raised as to the right of the Cincinnati, Hamilton and Dayton Railroad Company to vote upon the bonds which it held of the Dayton and Union Railroad. It was alleged that it held the bonds illegally; that it got the control of the same, and placed them in the hands of its directors to enable them to vote at the election for the purpose of getting control of the Dayton and Union Railroad, and of running the same in the interest of the Cincinnati, Hamilton and Dayton Railroad Company. It was held that it was not necessary to decide the question so raised, although the question was elaborately discussed upon the argument; but the learned justice who wrote the opinion in the case says, in reference thereto, that "we are all inclined to the opinion that it, the Cincinnati, Hamilton and Dayton Railroad Company, had no such power." This case seems to be the nearest in point of any that I have been able to find, and, while it was not necessary to decide the question in disposing of the case, yet all of the judges of the highest court of the state of Ohio were of the opinion that the railroad company who had acquired the bonds of another railroad company had no power to vote thereon, and thus acquire control of such corporation.

In the case under consideration, the New York, Lake Erie and Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York and Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It

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would then be for the interests of the New York, Lake Erie and Western Railroad Company to have the Buffalo, New York and Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow stockholders, and if so they have a right to complain.

My conclusions, therefore, are that while the New York, Lake Erie and Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stockholders of the Buffalo, New York and Erie Railroad Company have the right to have it enjoined from so voting in case it threatened to do so. Judgment should be ordered for the plaintiffs, in accordance with the views herein expressed, with costs.

SUPREME COURT.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK agt. CHARLES H. LONGSTREET, impleaded, &c.

New York (city of) — The exclusive right to establish and regulate ferries belongs to the corporation — What is such an interference with a ferry franchise as to authorize an injunction.

A person running regular trips with a steamboat from One Hundred and Twenty-ninth street, North river, to Fort Lee, New Jersey, under a coasting license, when a ferry has been established from One Hundred and Thirty-second street to Fort Lee, is attempting to use a ferry franchise which the corporation of the city of New York has the exclusive right to grant; and an injunction will lie to restrain such persons from interference and competition with such ferry franchise.

Special Term, June, 1882.

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W. C. Whitney and D. J. Dean, for plaintiff.

Scudder & Carter and G. A. Black, for defendant.

LARREMORE, *J.*—On the 5th and 12th of June, 1881, the defendant above named, without plaintiff's license, ran the steamboat *Osseo*, of which he was master and owner, at stated intervals, to and from One Hundred and Twenty-ninth street, New York, and Fort Lee, New Jersey. The plaintiff had previously established a ferry and granted a license thereof from One Hundred and Thirty-second street, New York, to said Fort Lee, and now seeks an injunction restraining the defendant from interference and competition with such ferry franchise.

The defendant claims the right to run his boat under a coasting license granted pursuant to the laws of the United States.

Two questions are thus presented for determination :

First. Is the defendant attempting to use a ferry franchise?

Second. Has the plaintiff an exclusive right to grant the exercise and enjoyment thereof?

The evidence fully sustains an affirmative answer to the first inquiry. The "*Osseo*" made regular trips from one side of the river to the other, thereby interfering with plaintiff's exclusive right to run a ferry from the city of New York to the New Jersey shore, at Fort Lee (*See Elizabethport and N. Y. Ferry Co. agt. U. S.*, 5 *Blatch.*, 198; *Midland Ter. and Ferry Co. agt. Wilson*, 28 *N. J. Eq.*, 537).

The second proposition involves the consideration of a more delicate matter.

By the Dongan and Montgomerie Charters of 1686 and 1730 the sole, full and whole power of appointing ferries around Manhattan Island to Nassau (Long) Island, and also to any of the opposite shores, was granted to the "mayor, aldermen and commonalty of the city of New York," and their successors, forever (1 *Kent's Charter*, 15, 17, 98).

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The validity of this municipal right has repeatedly received judicial recognition (*Costar* agt. *Brush*, 25 *Wend.*, 628; *Benson* agt. *The Mayor, &c.*, 10 *Barb.*, 223; *The Mayor, &c.*, agt. *N. Y. and N. E. Transfer Co.*, 14 *Blatch.*, 159; *Same* agt. *N. Y. and Staten Island Ferry Co.*, 8 *Jones & Spencer*, 232, 300).

The right to establish or regulate ferries is not included in the power ceded to the federal government to regulate commerce * * * among the several states (*Const. U. S.*, art. 1, sec. 8; *Conway* agt. *Taylor's Exrs.*, 1 *Black*, 603; *Fanning* agt. *Greggoire*, 16 *How.* [*U. S.*], 524; *People* agt. *Babcock*, 11 *Wend.*, 586; *Freeholders Hudson Co.* agt. *The State*, 4 *Zab.* [*N. J.*], 718).

It is unnecessary to elaborate upon this point. The cases above cited establish the principle that a ferry franchise is the subject of state or municipal legislation and not of federal authority.

It is urged, however, that this state, in the exercise of its supreme sovereignty, by the act of May 14, 1845 (*Session Laws*, 1845, chap. 352), assumed, or, as it has been phrased, usurped the right of the plaintiff to license and regulate future ferries.

Whatever may have been the legal effect of that act, I subscribe to the decision, in *The People* agt. *The Mayor, &c.* (32 *Barb.*, 102), that it was repealed by the new charter of 1857, whereby the plaintiff was restored to its original rights as specified in the ancient charters.

The plaintiff is entitled to a permanent injunction against the defendant.

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SUPREME COURT.

v.
DANIEL E. SICKLES agt. THE MANHATTAN GAS-LIGHT
COMPANY.

Gas companies — Power of a court of equity to restrain a gas company from removing meter for non-payment of bill claimed by them to be due — Injunction.

The law of 1859, allowing gas companies to stop the supply of gas in case of the non-payment of bills for the gas, has not made the gas company the sole judge of the question whether any, and, if so, what amount of remuneration is due to it; nor has the right of a party to resort to the courts to have the question whether a case has arisen in which the company is justified in cutting off his supply of gas, and to have the amount due ascertained and settled, been taken away.

When a dispute arises between the company and a consumer, the latter is entitled to have his rights investigated by the courts.

In such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried.

Special Term, April, 1882.

MOTION to continue a temporary injunction to restrain the defendants from removing the meter or cutting off the supply of gas from the plaintiff's premises, at No. 14 Fifth avenue. The plaintiff asserted that unjust and improper bills for gas, between the 18th of November, 1880, and 19th of October, 1881, were presented by this company, during part of which time he was absent in Europe, his residence closed and the gas never lighted. He says he offered to pay for the gas consumed, but that this company refused to accept, and threatened to remove the meter and cut off his supply of gas. He asks, in his complaint, that the amount due the company be ascertained and that the company be directed to accept the sum so ascertained, and restrained from removing the meter.

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M. B. Field and John Graham, for plaintiff.

H. H. Anderson, for defendant.

LAWRENCE, *J.*—The plaintiff alleges that heretofore and on or about the first day of November, 1880, he requested the defendant to supply him with illuminating gas at No. 14 Fifth avenue, and in pursuance of said request, said defendant put in a gas meter, and has since supplied the plaintiff with said illuminating gas. That heretofore and before the commencement of this action, the defendant presented to the plaintiff and demanded payment of unjust and improper bills, for gas alleged to have been furnished to the plaintiff, at his said residence No. 14 Fifth avenue aforesaid, between the 18th day of November, 1880, and the 19th day of October, 1881, during a great part of which period this plaintiff was absent from the United States, to wit, from about the 29th day of January, 1881, to about the 6th day of May, 1881, and his said residence was closed and the gas never lighted therein, and which gas was never furnished to or consumed by this plaintiff. That the plaintiff has either paid the defendant or offered to pay the defendant for all gas consumed by him, and is now ready and willing and still offers to pay for the same, but the defendant has refused and still refuses to accept the same, and has threatened and still threatens to remove the said meter, and to cut off the supply of gas to the plaintiff's said premises, to the plaintiff's great injury. And he prays that the amount justly due by the plaintiff to the defendant may be ascertained, and that the defendant may be adjudged to accept the same. And that the said defendant, its officers, &c., may be enjoined and restrained from removing the meter from plaintiff's said premises, or from cutting off the supply of gas therefrom, and for such other and further relief, &c.

By chapter 311 of the Laws of 1859, section 9, it is pro-

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vided that "if any persons or person supplied with gas by any such gas-light company, shall neglect or refuse to pay the rent or remuneration due for the same, or for the meter, pipes or fittings let by the company for supplying or using such gas, or for ascertaining the quantity consumed, as required by his or their contract with the company, or shall refuse or neglect, after being required so to do, to make the deposit in this act mentioned and thereby authorized to be required, such company may prevent and stop the gas from entering the premises of such persons or person, and in all cases in which any such gas-light company is or shall be authorized to cut off, prevent or stop the supply of gas from any premises, their officers, agents or workmen may enter into or upon any such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and separate, take and carry away any such meter, pipe, fittings or other property of the company, and may disconnect any meter, pipe, fittings or other works whether the property of the company or not, from the mains or pipes of the company."

Notwithstanding the very comprehensive language which is used in the section of the act just quoted, I do not understand that the statute has made the gas company the sole judge of the question, whether any, and if so, what amount of rent or remuneration is due to it, nor that such company's determination is necessarily binding and conclusive upon the consumer, nor that by anything in the section contained, his right to resort to the courts to have the question whether a case has arisen in which the company is justified in cutting off his supply of gas ascertained and settled has been taken away. Courts of equity have frequently interfered by injunction in cases of a similar or analogous character.

See *Cromwell agt. Stevens*, (2 *Daly*, 15), where it was held that an injunction would be granted to restrain the Croton Aqueduct Board of the city of New York, from cutting off

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the croton water from the plaintiff's buildings, on the ground of the non-payment of the water rate, where the water rate charged by them, and for the non-payment of which they claimed to stop the supply, was more than was authorized by law (*See, also, Brooklyn City Railroad Company agt. Furey*, 4 Abb. Pr. Rep. [N. S.], 364; *The People agt. The Canal Board*, 55 N. Y., 390, 393, 394, *per ALLEN, J.*).

In *Morey agt. The Metropolitan Gas-Light Co.* (33 Superior Ct. Rep., 185) it was held that the right of a gas company, under the section of the act to which I have just referred, to shut off the gas from the premises of a person who is a customer, and who has made the deposit required, *depends wholly upon the fact as to whether or not that person is in arrears for gas furnished by the company, and that is a question of fact to be determined by evidence, and not by the will or conclusion of the company.* That was an action brought to recover damages for cutting off the supply of gas, and not a suit for an injunction to restrain its cutting off. But the principle there asserted is applicable in my opinion to this case. In support of the plaintiff's motion to continue the injunction, several affidavits are produced which are to the effect that the plaintiff sailed for Europe on or about the 29th day of January 1881, and did not return until about the 6th day of May, 1881. That during the whole of this period the plaintiff's premises were closed, and the gas was turned off and was never once lighted in them, or in any part of them, the meter remaining on the premises during this time, but that no gas was consumed.

The affidavits also show that a Mr. Dudley occupied premises in the same building, and that between the 1st and 10th of May, 1881, he and his entire family went out of town; that their premises were closed, and that the gas was turned off between the meter and the street main, and that it so remained turned off until about the 20th of August, 1881, but that nevertheless gas bills were sent in regularly every

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month, showing the index of the meter and the amount of gas consumed. Also that a Doctor Spaun, who occupied an office in the same building, having had a difficulty in regard to the amount of his gas bill, received first a bill for six dollars and ninety-six cents, after his gas had been cut off, and without having used any more gas he subsequently received a bill for eleven dollars and one cent. The cases of Dudley and Spann are not, of course, controlling in regard to the disposition of this motion, but the facts stated in the affidavits in respect to their cases go to corroborate the plaintiff's theory, that the meters furnished by the defendants are not always accurate, and go to show that the meters in that particular house were inaccurate.

On the part of the defendant it is stated that a report having been made to the company that the plaintiff desired to have the meter inspected, the vice-president caused it to be removed and inspected, and that the result of such inspection was, that the meter instead of registering too much, registered too little; that is, that it passed one hundred and four feet of gas, to every one hundred feet registered, and that with this exception the meter was in good condition and working order.

By the affidavit of Thomas Kearney, who was an indexer in the employ of the company, it appears that when he told the wife of the janitor that he came to cut the gas off from General Sickles' meter, he was told in substance that the General was short of money and was expecting a remittance from some quarter, and would send over the money as soon as he could get it. That at a subsequent interview with the janitor, he stated to him that he was ordered to shut off the gas for non-payment of bills, and that the janitor refused to let him in. By the affidavit of Hadley, also an indexer, it appears that at an interview with General Sickles on the 15th of November, 1881, the plaintiff said: "If the meter is tested and you can prove to me that I used the gas, I will

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pay it." That this was reported to the vice-president, and that the affiant was directed by him to return to the premises and change the meter, and bring the meter then there to be proved. That he took out the meter and brought it to the proving department in the charge of the inspector, the substance of whose affidavit I have stated. Sweeney, another indexer, makes an affidavit to which he annexes a statement, stated by him to be in all respects true, showing the amount of gas which passed through said meter between October 17, 1880, and October 19, 1881, and Tally, an inspector of meters in defendant's employ, states that his visits to the meters are so timed as to be between the days of visitation, made by the person who takes the amounts, for the purpose of making out bills. That he visited the premises in question, and he annexes to his affidavit a schedule, showing the results obtained by him, which do not differ materially from those returned by Sweeney, when the difference in the time at which the respective indexes were made is taken into consideration. The secretary of the American Meter Company makes an affidavit that it is impossible for a meter to register or indicate gas without gas passing through it, and the president of the company makes an affidavit to the same effect. The defendants, on the argument of the motion, invoked the principle, that where an answer denies all the equities of the bill, fully and unequivocally, the injunction must be denied. But in this case I find that the answer of the defendant's was not served until after the argument of the motion. It is not, therefore, before the court, and it has not been read by me. It may, however, be contended by the defendants that the affidavits read on the motion, answer all the material allegations of the complaint and of the moving papers. To determine this question it is necessary to look a little more closely at the schedules showing the amount of gas alleged to have been consumed by the plaintiff. It is beyond a doubt, on the affidavits before me, that the plaintiff left this country on the 29th of January,

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1881, and remained away until the sixth day of May of that year. The last bill which was rendered prior to his departure, according to the schedule annexed to the affidavit of vice-president Carpenter, showed a consumption of 3,600 cubic feet between that date and the date of the rendition of the immediately preceding bill, to wit, on the eighteenth of December. The bill preceding that of December eighteenth was rendered November 17, 1880, and between those two dates, the plaintiff is stated to have consumed 4,200 cubic feet of gas. A bill was rendered, also, on the sixteenth of February, eighteen days after the plaintiff had left the country, which showed the consumption of 2,100 cubic feet between that date and the eighteenth of January. If this bill was correct, the plaintiff consumed 2,100 cubic feet of gas between the eighteenth of January and the twenty-ninth of January, the date on which he left, and on which the gas was cut off, or in eleven days. The next bill which was rendered is dated the eighteenth of May, and shows a consumption between the 16th of February, 1881, and that date, of 1,000 feet of gas. At that time, the plaintiff had been home twelve days. The plaintiff contends that on the face of these bills, it is apparent that he has been charged for gas consumed during his absence, when the gas was cut off, and when none was or could have been consumed by him. The bills rendered before his departure show that the plaintiff at times consumed between 116 and 135 cubic feet of gas per night, while the bill rendered on the sixteenth of February, which showed the amount of gas consumed by him between January eighteenth and January twenty-ninth, a period of eleven days, shows a consumption of 2,100 cubic feet, or of nearly 200 feet per night. I think that the inference strongly arises from this statement that the meter did not register correctly, and that the plaintiff, before submitting to the annoyance and vexation of having his gas cut off, is entitled to have the question tested as to the correctness of the bills presented to him.

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It is true that the defendant showed that the meter in question had been properly tested and proved by the proper officers, and it is proper to state in this connection that everything appears to have been done which could have been done by it to secure accuracy and correctness in the meter, but the fact remains that in addition to the alleged case of the plaintiff other parties occupying rooms in the same house received bills for gas indicated by other meters as having been consumed by those parties, when they were confessedly absent from the city, and the gas had been shut off. This evidence tends strongly to show that gas meters are not infallible. As I have before observed, I do not understand that the gas company is vested by statute with the power of positively determining as to the amount of the "rent or remuneration due to it." I am, therefore, of the opinion that when a dispute arises between the company and the consumer, the latter is entitled to have his rights investigated by the court. In this case I am free to say that the preponderance of the evidence on the affidavits seems to me to be with the plaintiff, and as he expresses himself to be ready and willing to pay the amount actually due from him, I am inclined to continue the preliminary injunction until the cause can be tried. On the trial the amount which is due from him to the company can be ascertained and adjusted (*See Hendrickson agt. The New York Central Railroad Co.*, 78 N. Y., 423). The learned counsel for the defendant contended upon the argument that in a case of this character an injunction should not be granted, for the reason that the defendant is perfectly responsible, and that the plaintiff could have paid the amount demanded of him under protest, and brought an action to recover the amount illegally demanded from him. In this view I do not concur, for the reason that it has long been settled that a court of equity will intervene by injunction to prevent irreparable mischief. This seems to me to be a case in which, if the plaintiff is right, it cannot be justly claimed

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that he can be fully compensated by an action for damages. The use of gas in cities has become almost as great a necessity as the use of water, and an illegal deprivation of one or the other, particularly where such use is for ordinary domestic and family purposes, would cause, I think, such damage as to call for the interposition of a court of equity (*See Cromwell agt. Stevens, 2 Daly, 15*). As I am desirous of fully protecting the rights of the company in case it should be eventually determined that the plaintiff is not entitled to an injunction I will require the plaintiff to increase the security given upon obtaining the preliminary order if the defendant establishes that such security is not adequate to satisfy any damages which it may sustain by reason of the granting of the injunction.

The motion to continue the injunction will be granted, with ten dollars costs.

SUPREME COURT.

THE PEOPLE *ex rel.* FRANK R. SHERWIN agt. MICHAEL L. MEAD.

Oyer and terminer — Jurisdiction to try indictment found by court of sessions — Bench warrant — Justice of supreme court — No power to let one arrested on bench warrant to bail while a court is in session having jurisdiction to try the indictment — Practice as to bench warrants, before and since the Code of Criminal Procedure — Code of Criminal Procedure, sections 301, 302.

The court of oyer and terminer has jurisdiction to try an indictment found in the court of sessions of the county without any order of the sessions sending the indictment to the oyer for trial.

On an indictment found before the Code of Criminal Procedure took effect, a justice of the supreme court has no power to let one arrested on a bench warrant to bail while a court is in session having jurisdiction to try the indictment.

The statute, prior to such Code, authorizing a district-attorney to issue a

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bench warrant for the arrest of one indicted, makes no requirements as to the form of the warrant or the matters which shall be stated therein. The sufficiency thereof must be determined by the common-law rule on the subject.

It is sufficient if the bench warrant clearly indicate the nature of the offense for which the accused stands indicted, and the place and the court in which the indictment is pending.

Sections 301 and 302 of the Code of Criminal Procedure do not, by section 902, apply to indictments found before such Code took effect.

Sections 301 and 302 only apply to the form of a bench warrant to be issued by the clerk, on the application of the district-attorney, in cases where the prisoner has been let to bail, or has deposited money instead thereof, and has failed to appear in pursuance of his recognizance.

When the district-attorney himself issues the bench warrant, he is not required to follow the form provided in section 301.

Where one is served in the city of New York with a subpoena issued by a court in Albany county, and fails to obey it, he is guilty of a criminal contempt, for which he may be indicted in Albany county.

Personal presence at the place where the crime is perpetrated is not indispensable to constitute an offense.

Failure to attend the court in Albany county impeded and delayed the administration of justice at that place, and the law presumes the accused intended that his behavior should have that effect.

If the return show a valid and sufficient authority for continuing the custody and arrest of the prisoner, it is no ground for reversing an order dismissing a *habeas corpus* that the officer making the return had also arrested the prisoner on other similar warrants.

On *habeas corpus* the officer issuing the writ may inquire whether there was any such indictment as is stated in the bench warrant, and whether the court in which it was found had jurisdiction of the subject-matter.

The question as to the guilt of the prisoner cannot be inquired into on *habeas corpus*.

Where one who has disobeyed a subpoena is proceeded against by indictment for a criminal contempt, the rules and tests applicable to a civil proceeding to punish such disobedience do not apply.

Civil and criminal proceedings are entirely independent of each other. They may be prosecuted at the same time; and a conviction under one is no bar to a prosecution under the other.

First Department, General Term, May, 1882.

Before BRADY, DANIELS and BARKER, JJ.

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On the 4th day of February, 1882, the relator was in the custody of the respondent, Michael L. Mead, in the city of New York, by virtue of a bench warrant, issued by the district-attorney of the county of Albany, dated the 3d day of February, 1882, wherein he was commanded to take into custody the relator. The following is the part stating the offense: "Who stands indicted by the court of sessions of the county of Albany for contempt, and bring him before said court, at the City Hall, in the city of Albany, in said county, if the said court shall then be in session, together with this warrant; but if the said court be not in session, you are hereby commanded to deliver him, together with this warrant, to the keeper of the Albany county jail," etc.

On the said fourth day of February, Justice DONOHUE, on the petition of the relator, issued a writ of *habeas corpus*, commanding the person having the custody of the relator to bring him before the justice, that he might be discharged, the petitioner claiming that he was illegally arrested and detained, and if it should appear that he was lawfully in custody that he might be let to bail. An immediate return was made by Mead, wherein he stated that he had arrested the prisoner, and held him pursuant to the said warrant, a copy of which was annexed, and by no other process. Without further proceedings being had that day, they were adjourned until the eighth day of February.

The hearing proceeded from day to day until the first day of March, when said justice dismissed the proceeding and remanded the relator to the custody of the said Michael Mead. It was made to appear to the said justice that the court of oyer and terminer, in and for the county of Albany, commenced a term of its court on the sixth of February, and was in session during the pendency of the proceedings. The relator, pending the proceedings, presented to the court a paper purporting to be a copy of the indictment, found in the Albany sessions, upon which the bench warrant was issued, which appears to have been received by the court, and

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acted upon by the counsel for the relator and the district-attorney as a true copy of the indictment pending against the prisoner. The indictment charged in substance that the prisoner had been duly and lawfully subpcœnaed to attend a term of the court of oyer and terminer in and for the county of Albany, at the City Hall, in the city of Albany, on the 18th day of May, 1874, at three o'clock in the afternoon of that day, then and there to testify and give evidence on behalf of the people concerning a certain indictment then to be tried in said court, against Charles H. Phelps, for grand larceny; that said writ of subpcœna was, on the 1st day of May, 1874, at the city of New York, state of New York, exhibited to the said prisoner, and duly served upon him; and that the prisoner, with an attempt to impede and obstruct the due course of justice, unlawfully and willfully disobeyed the writ of subpcœna, and did not appear before the court of oyer and terminer at the time and place specified in the writ of subpcœna, to testify as by said precept he was commanded, to the great hindrance and delay of public justice and in contempt of said court. It was ruled on the hearing that the prisoner was lawfully arrested and detained, by virtue of the precept in the hands of Mead, and that the prisoner was not entitled to be let to bail, for the reason that the court of oyer and terminer, in and for the county of Albany, was then in session, having jurisdiction to try the indictment. It was conceded by the district-attorney that no order had been made by the court of sessions, transferring the indictment to the court of oyer and terminer for trial. From the order dismissing the *habeas corpus* proceedings, and remanding the prisoner to the custody of Mead, the relator appealed to this court.

H. E. Tremaine, for relator.

N. C. Moak, for people.

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BARKER, J. — The court of oyer and terminer, in and for the county of Albany, had jurisdiction to try the relator upon this indictment without any order from the court of sessions, in which the indictment was found, sending the same to the oyer and terminer for trial (3 *Revised Statutes*, 205, *secs.* 29 and 30; 2 *Ed. Stat.*, 214; *The People agt. Myers*, 2 *Hun*, 626; *The People agt. Gay*, 10 *Wend.*, 509; *The People agt. The General Sessions*, 3 *Barb.*, 141; *The People agt. Quimbo Appo*, 20 *N. Y.*, 577). The court of oyer and terminer being in session while the proceedings were pending the justice of the supreme court had no power to let the prisoner to bail for the reason that the statute limits his authority in express terms (2 *Revised Statutes*, 728, *secs.* 56 and 57; *The People agt. Clews*, 14 *Hun*, 90; *The People agt. Clews*, 77 *N. Y.*, 39 and 40). In this case it was distinctly affirmed in this court and in the court of appeals that if the court having jurisdiction to try the indictment was in session at the time the judge was applied to to let the prisoner to bail he had no power to do so.

It is claimed by the relator that the bench warrant did not, upon its face, charge the relator with having committed an indictable offense, and for that reason he should have been discharged. The statute authorizing the district-attorney and other officers to issue bench warrants for the apprehension of indicted parties makes no requirements as to the form of the warrant, or the matters which shall be stated therein; and the sufficiency of the same must, therefore, be determined by the common-law rule on the subject (2 *Revised Statutes*, part 4, chap. 2, tit. 4, art. 2, sec. 55, *Laws of 1847*, chap. 338). The statute declares that every person who shall be guilty of any criminal contempt, as defined therein, shall be liable to indictment therefor as a misdemeanor, and upon conviction shall be punished in the mode and manner also determined by the statute. A criminal contempt is defined to be a willful disobedience of any process or order lawfully issued by a court of record. This bench warrant recites the fact that the prisoner had been indicted, the court wherein

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it was pending, and stated the offense imputed to him. It is not necessary that a bench warrant issued for the apprehension of the indicted party should be as full and complete in its recitals and statements as a warrant issued under the statute to apprehend a party to be brought before a magistrate for a preliminary examination. It is sufficient if the nature of the offense for which he stands indicted is clearly indicated, and the place and the court in which the indictment is pending. Here the fact is stated that the prisoner is indicted, the court wherein it was found, and the nature and character of the offense imputed to him. It indicated that the offense charged upon him was a misdemeanor and not a felony, and he was sufficiently informed to prepare for trial at the place mentioned in the warrant (*Pratt agt. Bogardus*, 49 *Barb.*, 90, and the cases there cited; *People agt. McLeod*, 1 *Hill*, 378; *Barbour's Criminal Law*, 525). It is also urged by the learned counsel for the relator that the bench warrant was void for the reason that being for a misdemeanor there was not a compliance with sections 301 and 302 of the Code of Criminal Procedure. This indictment was found in 1874, before those sections were enacted, and it is provided in section 962 that all actions and proceedings commenced prior to the enactment must be conducted in the same manner as if the same had not been passed. The provision referred to, as to the form and contents of the bench warrant, has no application to this case (*The People agt. Sessions*, 62 *How. Pr. R.*, 415).

By section 300 it is, in terms, provided that a bench warrant for the arrest of any offender indicted may be issued by the district-attorney in the same manner and form now prescribed by law, at any time after such indictment shall be found. Sections 301 and 302 only apply to the form of a bench warrant to be issued by the clerk; and he is authorized to issue a bench warrant, on the application of the district-attorney, in instances where the prisoner has been discharged on bail, or has deposited moneys instead thereof, and had

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failed to appear in pursuance of his recognizance. When the district-attorney issues the bench warrant himself, he is not required to pursue the form provided in section 301; and section 302 seems to be intended to provide for the form of a bench warrant, to be issued by the clerk on the order of the court, when the offense is a misdemeanor only. The point was also made that the court of sessions for Albany county had no jurisdiction to find the indictment; and that it appears from the indictment itself that the prisoner had not committed any offense in the county of Albany; and that if he was liable to indictment for disobeying the process of the court, that the offense was committed in the city and county of New York, and not elsewhere. The prisoner is a citizen of the state, owing obedience to its laws, and he is charged with having violated the same. Having been duly notified to attend, at particular time and place, before the tribunals of the state, then and there to give evidence in a pending proceeding, and having willfully and purposely failed so to do, the offense of non-appearance was consummated and committed, in the eye of the law, in the county of Albany. The injury to the public, resulting from his non-attendance, occurred in that county, and not in the city and county of New York, where the process was served upon him. Personal presence at the place where the crime is perpetrated is not always indispensable to make out an offense against the accused party, and there are many instances where the offender will not be allowed to gainsay that he was not at the place where the crime imputed to him happened. This is one of that class. The court whose process he disobeyed was a court in and for the county of Albany, and the offense charged upon the prisoner consists in not being in the presence of the court, ready to testify when called for that purpose. For aught that does appear, he was within the county of Albany on the day that he was required to be in court and answer to his name; and if such was the fact, the district-attorney may prove it upon the trial, with a view of establishing the willful

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disobedience to the process of the court. The case is similar to the one where a person sends threatening letters from one county to another through the mail. The offense, in such a case, is regarded as consummated at the place and time where they were received by the person to whom they are addressed, and the sender may be indicted and tried in such county. The act of sending produced the injury in the county where it was received, by disturbing and harassing the feelings of the party to whom it was addressed. In the case at bar, the act of non-attendance was an indignity to the court sitting in the county of Albany, and impeded and delayed the administration of justice at that place; and the law presumes that the prisoner intended that his behavior should have that effect and influence (*The People agt. Rathbun*, 21 *Wend.*, 509; *The People agt. Adams*, 3 *Denio*, 190). On the hearing, the relator proposed to show that the officer had other bench warrants in his possession of the same character and import as the one returned, and that the officer had served the same and claimed the right to detain the prisoner by such authority. This was overruled and the relator excepted. If that was a pertinent and proper question for the prisoner to raise upon the hearing, we are unable to discover how the ruling limiting the inquiry to the validity of the warrant presented by the officer, can lead to a reversal of the order dismissing the *habeas corpus* proceedings, for the reason that the officer did present valid and sufficient authority for continuing the custody and arrest of the prisoner. The offer which was made to go into an inquiry as to the facts and circumstances upon which the indictment was founded, was properly rejected. The officer had jurisdiction to inquire whether there was any such record of indictment, as claimed by the people, and if there was none, or the court in which it was found had no jurisdiction over the subject-matter, then to discharge the prisoner. But as to the guilt of the prisoner as charged in the indictment, no inquiry could be made in these proceedings. The prisoner's counsel has sought to test the validity

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of the indictment and the sufficiency of the warrant by applying those rules and tests which are applicable to a case where a party is charged with contempt of court, and the court has instituted proceedings with a view to the punishment of the offender, and has condemned him and pronounced sentence and issues its order of arrest to carry its judgment into effect. These rules have no just application to this case, where the party is proceeded against, upon the complaint of the people, and is in due form indicted by a grand jury attending upon a court having jurisdiction of the offense. The statute has declared in express terms that every person who shall be guilty of a willful disobedience of any process or order lawfully issued or made by a court of record, is guilty of a misdemeanor, and may be punished therefor. The prosecution by indictment may proceed by the usual and customary course of procedure, without inquiry whether the court, whose process has been held in contempt, has taken notice of the disobedience with a view of punishing the offender as provided by statute. Each of the proceedings is entirely independent of the other. They may be prosecuted at the same time, and a conviction under one is no bar to a prosecution under the other. The order dismissing the *habeas corpus* proceedings is affirmed, and the form of the order of affirmance will be settled by Mr. justice BRADY.

DANIELS and BRADY, JJ., concur.

Case No. 2.

THE PEOPLE *ex rel.* FRANK R. SHERWIN agt. MICHAEL.
L. MEAD.

Memorandum for Order.

After the relator was remanded to the officer as directed in appeal No. 1, and on the first day of March, the relator procured another writ of *habeas corpus*, returnable before the

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same justice. The officer in his return claimed to hold the prisoner by virtue of a bench warrant, issued by the district-attorney of Albany county, dated the 28th day of February, 1882, commanding him to arrest the relator, who stands indicted in the court of oyer and terminer for the county of Albany, wherein such indictment is now pending and to which it has been sent for contempt, and bring him before the said oyer and terminer now in session at the old Capitol, in the city of Albany, in said county, if the said court shall then be in session, together with the warrant, and also by virtue of a certified copy of an order of the court of sessions of the county of Albany, sending the indictment to the court of oyer and terminer for trial. He also returned the order of Mr. justice DOMONIK, granted in proceedings No. 1, remanding the relator to his custody. Copies of all these papers were produced before the judge in the hearing. The relator filed a traverse to the return. By the evidence upon the hearing before the justice it appears that at the time of the arrest of Sherwin on the fourth of February, as stated in proceedings No. 1, that Mead, the officer, had in his possession six bench warrants, all of the character of the one set forth in the other proceedings; that the officer claimed that he had not arrested the prisoner upon five of them, but had upon the one returned with the writ, and before the twenty-eighth of February he had returned the warrants unserved to the district-attorney of Albany county, and he thereafter issued to him the bench warrant, upon which he now claims the right to hold the prisoner. It appeared from an affidavit filed that the court of oyer and terminer, in and for the county of Albany, was in actual session at the time of the hearing. The justice dismissed the proceedings and remanded the prisoner to the custody of the officer. The questions presented and discussed on this appeal are substantially the same as those in appeal No. 1, and the order should be affirmed, the form to be settled by Mr. justice BRADY.

DANIELS and BRADY, JJ., concur.

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The order was settled as follows :

"It is ordered, that the said order appealed from be and the same is hereby in all things affirmed ; and the said Frank R. Sherwin is remanded and required, on the 29th day of November, 1882, at twelve o'clock noon, at the chambers of the supreme court, in the Court House in the city of New York, to surrender himself into the custody of the respondent Michael L. Mead, or such other officer as may have or be entitled to receive him into custody on the bench-warrant on which said Sherwin was arrested by said Michael L. Mead on the 4th day of February, 1882."

NOTE.—For reports of the case of Phelps, see *Phelps agt. People* (49 How. Pr. Rep., 437, 451, 470, 479; affirmed 6 Hun, 401; 72 N. Y., 334; 49 How. Pr. Rep., 463; affirmed 6 Hun, 428; 72 N. Y., 365); *People agt. Klugman* (49 How. Pr. Rep., 484); *People agt. Bank of North America* (75 N. Y., 547).

SUPREME COURT.

In the Matter of the EMPIRE MUTUAL LIFE INSURANCE
COMPANY.

Insurance (Life)—Reinsurance of policies by company no excuse for failure by policyholders for ten years to pay premiums—Nor is the act of reinsuring a violation of its contract with its policyholders.

Reinsurance of policies by a life insurance company formed under chapter 463 of the Laws of 1853 is no excuse for failure by policyholders for ten years to pay premiums, the act of the company in reinsuring not being a violation of its contract with the policyholders, and if it was, they should have acted with reasonable promptness.

Ulster Special Term, September, 1882.

EXCEPTIONS to referee's report.

George W. Wingate, for receiver.

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John C. Keeler, deputy attorney-general, and *Wm. D. Whiting* and *Lucius McAdam*, in behalf of policyholders sustaining such exceptions.

Raphael J. Moses, for sundry policyholders, opposing such exceptions.

WESTBROOK, J.—On the 12th day of March, 1881, Mr. Samuel B. Hamburger was, on the motion and nomination of the attorney-general of the state, appointed referee to pass upon claims against the Empire Mutual Life Insurance Company.

The referee has, after a full hearing of all parties, made his report to the court, by which he finds that certain policyholders, who failed to pay the premiums upon their policies after June 7, 1872 (the day upon which the Empire reinsured its outstanding risks with the Continental Life Insurance Company), had not, by such non-payment, forfeited their policies, and that they are entitled to share in the fund which the court has, by receiver, in its hands for distribution. To that part of the report exceptions have been filed, which will now be examined.

The Empire Mutual Life Insurance Company was formed under chapter 463 of the Laws of 1853, the title of which is, "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies." It continued the business which it was organized to carry on, that of life insurance, until the 7th day of June, 1872, when it reinsured its risks in the Continental Life Insurance Company, undertaking to transfer to such latter corporation its assets and to retire from business pursuant to the authority conferred upon it by section 19 of the act aforesaid, and under which it was created.

Very many of the policyholders of the Empire consented to the transfer and have surrendered their policies, accepting those of the Continental in lieu thereof. Those, however,

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which hold the policies to which the exceptions relate have neither accepted nor refused to accept the insurance of the Continental in the stead of that of the Empire, but have omitted to pay the premiums reserved by their policies, remaining entirely silent, and though cognizant of the attempted transfer of assets, discontinuance of business, and contract of reinsurance, have in nowise, prior to the present proceeding, dissented therefrom. The Empire Company has never been dissolved, nor adjudged insolvent; but on the contrary, for several years it kept an office for the transaction of its business, and has in fact, though a receiver was appointed over it on January 14, 1879, thus far paid its creditors in full. The Continental was placed in the hands of a receiver on the 25th of October, 1876.

Relying upon the case of *Meade* agt. *The St. Louis Mutual Insurance Company* (51 How. Pr. Rep., 1), the referee has allowed the policies, which have been described, as valid claims upon the fund. The exceptions present the legality of the allowance.

A reference to the case relied upon will show that it decides no such questions as are involved in the policies allowed as valid in the report now presented.

First. The St. Louis Company was a corporation created under the laws of Missouri. In the case referred to, judge PRATT shows that the company was not authorized by its charter to reinsure its risks and transfer its assets, "for the purpose," to use the exact language of his opinion, "of winding up the company." The Empire, on the other hand, was expressly authorized (*sec. 19 of chap. 463 of Laws of 1853*) to withdraw from business and necessarily, therefore, as an incident thereto, it was also empowered to use its assets to extinguish its liabilities, which was all it did when it procured for its policyholders reinsurance, which it asked them to accept in lieu of its own obligations. It did not bankrupt itself, but on the contrary always retained sufficient assets to meet its liabilities. Its action was not *ultra vires*, as

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that of the St. Louis company was, and it did not for such a cause give the insured an immediate remedy upon their policies of insurance. This conclusion not only clearly follows from the section of the act of 1853, to which reference has been made, but the legality of contracts of reinsurance has been expressly decided (*Glen et al. agt. The Hope Mutual Life Ins. Co.*, 56 N. Y., 379; *Fischer agt. The Hope Mutual Life Ins. Co.*, 69 N. Y., 161). The language of EARL, J., in *People agt. Security Life Insurance and Annuity Company* (78 N. Y., 114, *see p.* 125) is not at all inconsistent with this view. The Security was an insolvent corporation, confessedly so, and had not attempted to do what the Empire has done, viz.: reinsure its risks and retire from business. It was of a violation of law and discontinuance of business caused by actual insolvency that judge EARL spoke when he said that it had thereby "broken its engagements with its policyholders," and had become "liable to them on account of such breach."

Second. In *Meade agt. St. Louis Mutual Life Insurance Company* (51 How., 1) the plaintiff promptly avowed his dissent from the attempted reinsurance (*pp.* 3, 4 and 5) and brought his suit.

In the cases now presented, the insured expressed no dissent. They permitted the company to act upon the assumption that they intended to abandon the insurance. For nearly ten years they failed to pay premiums, and after this lapse of time they ask that their policies be deemed to be in life, and their failure to pay premiums excused upon the ground that the corporation had, itself, violated the contract of insurance by reinsuring its policies and transferring assets to effect reinsurance. It has already been shown that the act of the company was not a violation of its contract with the policyholders, asserting the present claims, but if it was they should have acted with reasonable promptness. Having slept upon their supposed rights for nearly ten years, and neglected to pay their premiums, they are in no condition to assume now, that the com-

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pany first broke its engagements with them. In the matter of *Coggeshall* agt. *The Continental Life Insurance Company*, it was held by the judge writing this opinion, that a policyholder, who had, for several years, neglected to pay his premium, without assigning any reason therefor, could not protect himself against a forfeiture of the policy by showing that the company was, during the time of such non-payment, unable to make good its contracts; and that it was necessary for him to put his refusal to pay upon that ground, notifying the company thereof. That decision is directly in point. Grant that the contract of insurance, by the transfer of assets to the Continental for the purpose of reinsurance, was broken, it was still competent for the holders of policies of insurance to abandon them, and of such abandonment, the failure to pay premiums for nearly ten years, without any explanation whatever conveyed to the insurer, must be held conclusive (*Lawrence* agt. *Dale*, 3 *Johns. Ch.*, 23; *same case on appeal*, under title of *McNeven and ors.* agt. *Livingston and ors.*, 17 *Johns.*, 437; *People* agt. *Widows and Orphans' Life Ins. Co.*, 15 *Hun*, 8).

The exceptions which have been discussed, must, for the reasons stated, be sustained, and the report, in other particulars, confirmed.

 Odell agt. Youngs.

N. Y. COMMON PLEAS.

JOHN H. ODELL, executor, &c., *et al.*, agt. CHRISTIANA YOUNGS.

Will—Trust in, which is void, by reason of the suspension of the power of alienation for more than two lives in being, is not cured by the death of the persons named, during testator's lifetime—Provision in will as to sale of dwelling-house, dependent upon the wife's consent, is made nugatory by her death.

Where a trust attempted to be created in a will is void from suspending the absolute power of alienation for more than two lives in being, the fact that the persons named died during testator's lifetime does not cure the invalidity of the devise.

A power of sale given to executors, though its exercise as to a dwelling-house was made dependent by a succeeding paragraph upon the wife's consent, was valid, that provision having been made nugatory by her death.

Equity Term, October, 1882.

BEACH, J.—An examination of the will submitted to the court for construction leads to these conclusions:

The trust attempted to be created is obviously void, from suspending the absolute power of alienation for the lives of the wife, son George and each of the other children. It is true the wife and son named died during testator's lifetime, but that did not cure the invalidity of the devise. The provision must be judged as created in the instrument, unaffected by facts subsequently arising. The testator clearly transgressed the statute against perpetuities, and demise of two of the lives during his life cannot avoid the penalty of transgressing (*Schettler agt. Smith*, 4 *N. Y. R.*, 328; *Van Nostrand agt. Moore*, 58 *id.*, 16; *Colton agt. Fox*, 67 *id.*, 348). These adjudications seem to overrule the contrary opinion expressed in *Lang agt. Ropke* (5 *Sand.*, 375) and *Griffin agt. Ford* (1 *Bosw.*, 123).

The ultimate disposition of the household furniture after

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the death of the testator's wife was not made ineffective by her prior decease. The death of the first legatee, under such circumstances, will not work a lapse of the limitation over to the substituted objects of testator's bounty (*Mowatt agt. Carow*, 7 *Paige*, 328).

The power of sale given the executors in the fifth clause is, in my opinion, valid. Its exercise as to the dwelling-house, by a succeeding paragraph was made dependent upon the wife's consent. That provision, however, was made nugatory by her death, and the item of realty must be considered to fall within the general terms in which the power is before given.

In conclusion, from these views the five children each take one-sixth of the real and personal estate, and the children of William, each one-third of the remaining part, all subject to the power of sale in the executors.

A decree may be submitted to conform with this opinion.

SUPREME COURT.

EDWARD B. COLLINS, respondent, agt. HENRY ROCKWOOD,
appellant.

Evidence — Under what circumstances memorandum admissible in — Justices court — Exceptions — no exception necessary in justices' court — when objection sufficiently definite.

It is an indispensable preliminary to the introduction of a memorandum in evidence, that it should appear that the witness is unable, without the aid of the memoranda, to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness that the writing is admissible.

It is the duty of the court in all such cases, to see before receiving a memorandum in evidence that it was made at or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witnesses, and that there is necessity for its introduction on account of the inability of the witness to recollect the facts.

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Where a witness has a distinct recollection of all the facts, independent of the memorandum, the latter should not be admitted in evidence. In reviewing justices' judgments, no exception to the ruling of the justice is necessary.

Where a book was offered in evidence and objected to as incompetent : *Held*, that the objection was sufficiently definite.

Fourth Department, General Term, June, 1882.

Before SMITH, P. J. ; HARDING and HAIGHT, JJ.

APPEAL from a judgment of the county court of Oswego county, reversing a judgment of a justice's court in that county.

The action was brought to recover the purchase-price of furs sold by plaintiff to defendant. The defense was a general denial. The trial was had before a jury, and a verdict in favor of the defendant.

S. N. Dada, for appellant.

C. H. David, for respondent.

HARDIN, J.—Upon the trial the plaintiff testified that on the 22d of December, 1876, he sold the defendant a muff and boa for the price of ten dollars, and that the defendant asked him to charge the same to him ; that he did so, and that the defendant had never paid for them, and still was owing plaintiff for them.

Upon his cross-examination plaintiff testified that he saw the defendant in his store in the spring, in April, the latter part, 1877, and he asked him for the amount of the purchase-price of the furs, and that he dunned him again in the fall of 1877. That the defendant said he had a memorandum at home, and he would go and see it.

The defendant was sworn as a witness in his own behalf, and testified that he had bought the property spoken of by the plaintiff, and that he paid the plaintiff April 21, 1877. He said : "I paid him ten dollars ; I made a memorandum ;

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this is the memorandum; subsequently Mr. Collins dunned me for the ten dollars; I think it was in January of the next year; he said, Mr. Rockwood, don't you know you owe me a little bill; I said, no, I don't know any such thing; he says, you do, I suppose you may have thought you had paid it; I said, I have paid it; I had it in my book at home; I went home and got the book; took it to him and he looked at it; this is the book and this is the memorandum."

[Book offered in evidence. Objected to. Incompetent. Objection overruled.]

Book is defendant's diary for 1877, under date of Saturday, April, twenty-first, in pencil, and reads: "Paid Collins for furs, ten dollars." Read and exhibited to jury. "There is no other entry of that date; I made it, the entry, that night or the next day; I made it before I went to New York; I went the next Tuesday; this was on Saturday." In his cross-examination the defendant said: "I have a good memory; I depend somewhat upon this diary; I would have known I had paid it if I hadn't had the book; remember distinctly my paying this money to Mr. Collins; I could not tell who was present, and I don't remember what kind of money; he had asked me for it; I had previously purchased of him oil cloth for my boat; I told him I knew what it was for; I was perfectly sure I had paid without looking at my memorandum; I went and got the memorandum; I said, Mr. Collins, here is the book; if it is there I have paid; I didn't look at the book after I talked with Collins, before I showed it to him, but I must have seen it; * * * I remember distinctly putting it there on the memorandum; I cannot swear that I remember the occasion of putting it down; I will swear I didn't put it down before it was paid; I might sometimes put down on a memorandum such as having a note due; I cannot swear as to the day or minute; I never do it with an account; I know it from my practice and from my memory." The county court reversed the judgment because the justice received the book in evidence.

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In the argument of the counsel for the appellant it is insisted that as no exception was taken to the ruling of the justice, the plaintiff could not question the ruling. We do not understand that an exception is necessary in a justice's court (*Roe agt. Hanson*, 5 *Lans.*, 304).

No case holding that it is necessary to except has been cited, and it has long been assumed by court, in reviewing justice's judgments, that no such exception is necessary.

When the book was offered in evidence it was objected to on the ground that it was incompetent. That objection was overruled. It is now insisted that the objection was too general, and that it was not sufficiently definite. And that, therefore, there was no error in overruling the same.

We do not see how the objection could be made more definite, more pertinent, more pointed, more appropriate to challenge the attention of the court to the point raised by it.

We are therefore brought to inquire whether the book was competent evidence; and whether there was error in the ruling of the justices' court in admitting the same in evidence, and in permitting it to be read and exhibited to the jury.

It appears the entry was not made in the presence of the plaintiff. It does not appear that it was read over to him, and assented to by him. It is therefore an entry made in the absence of the plaintiff and without any assent to it by him. The case is therefore distinguishable from *Turner agt. Parshall* (3 *Keyes*, 432). In that case it was sought to recover the purchase-price upon the alleged sale of a horse; and the defense consisted of a denial of the purchase. The plaintiff claimed that after he had sold the horse he made an entry in his account book of the sale of the horse.

Upon the trial the judge allowed the entry to be read to the jury, and charged the jury that it was a circumstance tending to prove the alleged sale.

When the book was offered in evidence there was an offer to show that the entry was exhibited to the defendant, who admitted its accuracy. In that case judge Noxon said: "Nor

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are we to decide whether the entry alone would have been competent." Here the offer to read the entry was accompanied by the offer also to prove that the entry was subsequently read to the defendant, and that he had admitted its correctness. That a statement to the plaintiff by the defendant, whether verbal or written, charging the latter with the purchase of a horse, at the agreed price of \$500, which statement was then assented to by the defendant, is competent evidence against the latter, would seem to be too plain a proposition for discussion.

The offer as made was proved, and was corroborated by the defendant so far as that he admitted that the statement was read over to him.

He denied that he admitted its correctness or promised to pay it. And it was held there was no error in receiving the entry under such circumstances. That case differs from the one before us, because there was no proof of any assent to the entry by the plaintiff. On the contrary, the evidence tended to show that he at all times disputed the correctness of the entry, whenever it was referred to. The case before us seems to fall within the rule laid down in the opinion of judge SELDEN, in *Russell agt. The Hudson River Railroad Company* (17 N. Y., 134), where he says: "It is, however, an indispensable preliminary to the introduction of such a memorandum in evidence that it should appear as in the case of *Halsey agt. Sinsbaugh*, that the witness is unable without the aid of the memoranda to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness, that the writing is admissible. It is the duty of the court in all such cases to see before receiving a memorandum in evidence, that it was made at or about the time of the transaction to which it relates, that its accuracy is duly certified by the oath of the witnesses, and that there is necessity for its introduction on account of the inability of the witness to recollect the facts." In referring to this case judge DENIO says, in *Gray agt. Mead* (22 N. Y., 462): "It

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is not doubted, in the opinion of the court in that case, that the memorandum was one to which the rule applied, but a new trial was granted because it did not appear but that the witness had a perfect recollection of all the matters sought to be proved by the memorandum."

In *Marbley agt. Shultz* (29 N. Y., 346), the same rule is approved, and it was held that a memorandum was incompetent because, in the language of judge MULLIN, "It was not intimated by the witness that he did not remember the fact without reference to the memorandum." And at page 355 of the same case judge DENIO reaffirms the same rule.

In the case in hand, before the ruling was made by the justice the defendant had sworn positively, viz.: "I paid Mr. Collins April 21, 1877; I paid him ten dollars; I made a memorandum; this is the memorandum; * * * I said, 'I have paid it;'" I had it in my book at home; it is true this occurred after the ruling was made, and in the course of his cross-examination, that the witness said: "I have a good memory; I depend somewhat upon this diary." But he immediately adds: "I would have known I had paid it if I hadn't had the book; *I remember distinctly my paying this money to Mr. Collins*; * * * I was perfectly sure I had paid without looking at my memorandum." We find in the evidence before the ruling no intimation of a want of memory of the facts sought to be established by the book, and therefore no necessity to resort to the entry to establish the fact, or to aid and fortify a willing and positive memory, ready to state the fact absolutely, of the payment of the ten dollars. We must therefore say, in the language of judge SELDEN, in *Russell agt. The Hudson River Railroad Company* (*supra*): "In the present case, for aught that appears, the witness had a distinct recollection of all the facts, independent of the memorandum. The latter was therefore improperly admitted" (*See also Corning agt. Ashley*, 4 Denio, 354; *Peck agt. Von Killen*, 76 N. Y., 604; *Dun agt. James*, 62 How., 307). It is sug-

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gested in behalf of the appellant that no harm could come from the erroneous reception from the book in evidence. We cannot agree to that view of the case. Here we have before us the positive testimony of the plaintiff that the ten dollars had not been paid, the positive testimony of the defendant that it had. And no other evidence or circumstance to solve the conflict, except such as the defendant sought to derive, and as we may reasonably suppose may have derived, from the entry in his diary, which he persistently offered, and induced the court to receive in evidence against the objection to it on the ground that it was incompetent. We therefore may not conclude that it is clear or probable that no harm came by the erroneous reception of the entry of the book in evidence. We may not therefore disregard the error. We must agree with the county judge in the result he reached, and affirm his judgment.

The judgment of the county court of Oswego county, reversing the judgment of the justices' court, is affirmed.

SMITH, P. J., and HAIGHT, J., concurred. Judgment of county court of Oswego county affirmed.

N. Y. SUPERIOR COURT.

In the Matter of GEORGE W. COLLINS.

Election law — What constitutes a person a resident of an election district.

Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there.

A person living with his wife during the period required by the constitution, on board of his lighter, along side pier five, in the East river, when not called away by business, acquires thereby such a connection between himself and the said pier, as to become a resident of the election dis-

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trict, in which the said pier is situated, within the meaning of the constitution, and the election and registry laws, and upon giving proof of these facts, before the proper officers, is entitled to have his name enrolled as a qualified voter of said district.

Special Term, October, 1882.

COLLINS applied to the superior court for a *mandamus* requiring the inspector of elections of the first election district of the first assembly district in the city of New York, to register his name as a voter. He made an affidavit that he was the proprietor of a lighter, on which he and his family live, and that his business was the transportation of freight in the harbor. When not engaged in that work his lighter was moored at Pier No 5, East river, and he regarded that as his place of residence.

FREEDMAN, J.—Section 1 of article 2 of the constitution, provides that every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of the state one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elected by the people, but such citizen shall have been, for thirty days next preceding the election, a resident of the district from which the officer is to be chosen for whom he offers his vote. And section three further provides that for the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas, nor by a student of any seminary of learning, nor while kept at any alms-house or other asylum, at public expense, nor while confined in any public prison.

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The election and registry laws enacted by the legislature are mere police regulations. Their object is to ascertain, by proper proofs, the citizens who shall be entitled to the right of suffrage established by the constitution, but they cannot restrict the right beyond the limits imposed by the constitution. The general intent is that every male citizen of the age of twenty-one years shall have the right to vote, but in order to exercise it at a particular election he must have been a resident of a certain locality for a certain length of time, and even then his absence from such locality does not in the cases enumerated in section 3 deprive him of his right. If, therefore, Pier 5, East river, were a house, and the relator had lived therein with his wife, while on shore, for the period required by the constitution, it is too clear for argument that he would be entitled to have his name registered as a resident of the election district in which the premises are situated. This being so, can it make any difference that he has kept his residence for the required period on board of his lighter and fastened his lighter to said pier when not called away by business? The constitution does not define the essentials of the required residence, and there is nothing in it upon which a court can hold that only a residence on land is intended. In the absence of a constitutional definition, the definition usually adopted by the courts must govern. Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there. The radical idea of the word is well illustrated by its use in English ecclesiastical law, to denote the actual and settled presence and abode of a parochial minister in and upon his parsonage house; otherwise expressed by the word incumbency, from *incumbere*, to lie upon (1 *Bl. Com.*, 390, 392).

The relator in the case at bar, in living with his wife during the period required by the constitution on board of his lighter

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alongside Pier 5 in the East river, when not called away by business, acquired thereby such a connection between himself and the said pier as to become a resident of the election district in which the said pier is situated within the meaning of the constitution and the election and registry laws, and upon giving proof of these facts before the proper officers was entitled to have his name enrolled as a qualified voter of said district.

A peremptory writ of *mandamus* must issue as prayed for.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE METROPOLITAN TELEPHONE AND TELEGRAPH COMPANY.

Attorney-general—When and when not authorized to appear by special counsel.

Under the act of 1848, the attorney-general has no right to appear by special or local counsel on the trial of a case at the circuit court.

N. Y. Circuit, October, 1882.

LAWRENCE, J.—In the case of *The People of the State of New York agt. The Metropolitan Telephone and Telegraph Company*, which is an action brought for the purpose of having it judicially determined “that certain poles now erected, or intended to be erected, in a certain street in the city of New York are a public nuisance and an obstruction to the public use of said street; that the said defendant forthwith remove each of said poles, and all the parts of said structure so by the defendant erected in said street, therefrom, and that the defendant restore said street in all respects to the condition in which it was previous to such erection; that the said

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nuisance be wholly abated and all the parts thereof entirely taken away, so that said street shall be and remain as it was before the said nuisance or structure was erected; that the defendant and its officers, agents and servants be restrained by injunction from putting any wires or other things upon said poles or any of them; and from erecting any more poles on said Twenty-first street, and from doing anything whatever with said poles except to remove them; that the plaintiff recover from the defendant \$2,000 damages and the costs of this action," both sides have answered ready, but the attorney and counsel for the defendant have objected that, as the attorney-general of the state is not present, either in person or by his duly constituted deputy, the action ought not to proceed, it being suggested to the court that, under the act of 1848, the attorney-general has no right to appear by special or local counsel on the trial of a case at a circuit court.

I am free to say that when the point was first suggested to me I was inclined to think that it was not well taken, for the reason that my own experience and my observation for many years past has been that in such actions the attorney-general has almost always appeared by special or local counsel. But upon reference to the statute I find that it is provided that:

"The attorney-general shall be and hereby is authorized to employ additional counsel in prosecuting and defending suits and proceedings in which the people are a party, or are interested, at any general or special term, or at chambers of the supreme court in any of the judicial districts of the state whenever the discharge of other official duties shall prevent him attending in person" (*Laws of 1848, chap. 357, sec. 2*).

It is quite obvious that the language of the statute does not embrace a trial at the circuit court, the language being "the attorney-general is authorized to employ additional counsel at any general or special term, or at chambers of the supreme court in any of the judicial districts of the state." This is not a general term or special term, nor is it the chambers of the supreme court, but it is a circuit court. I should have

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been inclined to think that, irrespective of that statute, the attorney-general had a general power to employ counsel in actions of this character, but the court of appeals in a very recent case have construed the statute, and it certainly would be an assumption on my part, sitting as a circuit court judge and as a member of an inferior tribunal, to undertake to impose a limitation upon the language employed by the court of appeals which the court certainly have not in terms imposed.

The case to which I refer is the case of *The Attorney-General agt. The Continental Life Insurance Company*, which, so far as I have been able to ascertain, has not yet been reported in the regular reports of the court, but which is to be found in the *The Daily Register* of the 19th of April, 1882. In that case special counsel had been employed by the attorney-general *In the Matter of the Continental Life Insurance Company*, and certain allowances had been awarded to defendant's counsel for services which they were alleged to have performed. It was conceded, on the argument of the case, that the allowances, if it were in the power of the court to grant allowances in such cases, or of the attorney-general to employ special counsel in such cases, were reasonable and proper, and the main point on which the case turned was as to the power of the attorney-general to employ counsel. The opinion was rendered by chief judge ANDREWS, and was concurred in by all the judges of the court who were present. In that case the court say :

“ We have not been able to find any statutory authority conferred upon the attorney-general to appoint special counsel to act generally for him in the conduct of suits or proceedings in which the state is interested. The Revised Statutes (1 R. S., 164, sec. 15) authorize the governor to employ counsel to assist the attorney-general in any suit or proceeding prosecuted or defended by him in behalf of the state. By chapter 357, Laws of 1848, the attorney-general is authorized to employ additional counsel in prosecuting or defending suits in which the people are a party, or are interested ‘at any

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general or special term or at chambers,' when official duties prevent his attending in person. This statute, as will be observed, limits the authority conferred to the appointment of counsel to appear at a term of court or at chambers, and then only when the attorney-general cannot be present in person. We find no other general statute conferring upon the attorney-general authority to employ special counsel on behalf of the state. It seems to be quite plain that the statutes referred to did not authorize the general retainer under which the petitioner in this case acted. The retainer was not confined to an appearance by the petitioner in court or at chambers, nor was it made upon the special exigency contemplated by the statute. *Independent of the statute, there seems to be no authority vested in the attorney-general to employ special counsel.* In view of the statutes regulating the employment of counsel, such authority cannot be deemed to be vested in that officer as incident to his office. Provision is made for the appointment of deputies to assist the attorney-general. This general provision and the statute authorizing the governor or the attorney-general, in certain cases, to appoint special counsel, seem plainly to exclude the inference of an authority in the attorney-general to appoint special counsel outside of the statute."

It will be observed that in that opinion the court say that not only is the authority of the attorney-general limited by the express provisions of the statute, but that he has no authority incident to his office to employ counsel. A very elaborate argument was had in this case on this point on Friday last, and I was much pressed by counsel with the point that it would be utterly impossible for the attorney-general to perform the duties of his office, if such a construction were given to the statute as is contended for by the defendant's counsel. With that consideration I, of course, cannot deal. The highest court of the state has said that no authority exists in the attorney-general outside of that statute to employ counsel, and they have also said, that the statute does not

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give him power to employ special counsel in such a case as this. And apart from that consideration, even if there was any doubt in my own mind as to the exact force of the language which the court has employed, it is the right of the defendants to insist that when this action is tried, it shall be tried by counsel who are beyond all dispute entitled to represent the state. Should they succeed upon the trial of this action, it is their right to have a judgment which shall be binding upon the state.

Perhaps it is unnecessary for me to say anything more, but I will observe, in conclusion, that the attorney-general himself, in his communication to the legislature dated the 11th day of April, 1872, seems to have concurred in the view which I have expressed, and seems to have put the same construction upon the decision of the court of appeals in the case to which I have referred as that which I have put on it. The question there was presented as to the power of the attorney-general, or the state, to have certain cases opened in which orders or allowances had been made, and without reading the whole language of the opinion. I will refer to a portion of it. The learned attorney-general says:

"The court of appeals has this day decided that the attorney-general had no power to broadly authorize the special counsel to represent him upon the conduct of these litigations, and, therefore, it impliedly follows that the service of papers on such special counsel, and his various appearances for the attorney-general, were unauthorized by law. I am of the opinion that under this decision the attorney-general may ask the courts with propriety to review the various orders granted upon the ground that the state has not been legally represented upon the hearing in those cases where the action was brought by the attorney-general."

In view of that opinion, and in view of the opinion of the court of appeals, I ought not, even if I entertained a doubt as to the construction of this statute, to force these defendants to trial, when if a judgment should be obtained in their

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favor an application might subsequently be presented to the court to open that judgment and set aside the verdict of the jury on the ground that the state had not been legally represented. Therefore, in obedience to the opinion of the court of appeals, I must sustain the objection of the defendant's counsel and I must direct that this case stand over until the attorney-general or one of his lawfully authorized deputies appears here on behalf of the state.

SUPREME COURT.

ORVIS agt. GOLDSCHMIDT *et al.*

Attachment—In action against two joint defendants, service of summons upon one within thirty days is sufficient—What notice subjoined to summons is sufficient—Complaint—What sufficient verification of—Code of Civil Procedure, sections 459-526.

Where a warrant of attachment is granted in an action against two joint defendants, a service of the summons upon one of the defendants within thirty days is sufficient compliance with the provision of the Code in that regard.

That the notice subjoined to the summons was not subscribed by the attorney, and omitted to state the day of the month on which the order for substituted service was made, were not fatal or jurisdictional defects.

Where all the allegations of a complaint are stated to be on information and belief, it is a sufficient verification that the complaint is true as the affiant is informed and believes.

Special Term, October, 1882.

Herman Frank, for the motion.

Herbert E. Kenny, opposed.

POTTER J.—This is a motion to set aside the service of a summons and complaint by substitution, and a warrant of

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attachment. The motion is made on behalf of one of two joint defendants, upon technical grounds only, and he appears in the action only for the purposes of the motion.

The grounds of the motion are that the summons was not served within thirty days after granting the warrant of attachment. I think the point is covered by service upon one of the defendants within that time, and that the proof of such service is sufficient.

I think the notice subjoined to the summons is a sufficient compliance with the statute. The defects complained of are that it was not subscribed by the attorney and omits to state the day of the month on which the order for substituted service was made. I do not think either of these defects are fatal or jurisdictional. The warrant of attachment may accompany the issuing of the order, and so may precede the commission of either of these irregularities in procuring an order for substituted service, and so be valid until failure to serve the summons in time.

The further, and in my mind the most serious objection is that the order for substituted service was void, and hence there has not been and could not be any valid service of the summons under it. The contention is that the complaint presented for procuring the order of publication was not verified (*Sec. 439, Code of Civ. Pro.*) All the allegations of the complaint in this case are stated to be upon information and belief. The verification is that the foregoing complaint is true as the affiant is informed and believes. Section 526, Code of Civil Procedure, prescribes that the verification of a pleading shall be to the effect that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. There are two ways of making the allegations of pleadings recognized by the rules of pleadings: one is absolute or unqualified, and the other qualifiedly upon information and belief. In many, perhaps a majority of the cases, the pleader employed both methods in the same plead-

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ing. In other cases but one mode of statement is used. The formula for verification was intended to be short, and is adapted as found in section 526, to a pleading containing both modes of statement. But the verification is only required to be adapted to and be appropriate to the mode of statement on the pleading. If the mode of statement in the pleading is absolute, then the verification shall be absolute; but if the mode of statement is qualified, then the verification should be qualified. To employ the twofold method of verification of a pleading which contains but one mode of statement is a waste of words, for they serve no purpose. A pleading is verified when the deponent affirms the truth of the allegations in the manner and to the degree stated in the pleading. This is verifying a pleading in effect according to the knowledge of the pleader.

My conclusion is that the pleading in this case was well verified.

SUPREME COURT.

In the Matter of the ATTORNEY-GENERAL agt. THE CONTINENTAL LIFE INSURANCE COMPANY.

Insurance (Life) — Receiver of insolvent company — How damages upon policies should be computed — Revaluation of policies not to be allowed because of subsequent death.

Where a receiver was appointed in a proceeding, instituted by the attorney-general, pursuant to chapter 468 of the Laws of 1853, for the purpose of dissolving an insolvent insurance company and distributing its assets, and by an order of the court the day was fixed (June 15, 1879), before which time the creditors of this corporation were required to file their claims. The claims represented by these motions were presented to the receiver prior to June 16, 1879. They were all at that time running policies, and were valued as such in the declaration and payment of a cash dividend, which was ordered by this court October 8, 1879.

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Between June 16, 1879, and January 1, 1881, the holders of these policies died, and on the eighth day of January of the latter year a motion was made for their revaluation because of such death:

Held, that the damages of every policy of insurance should be computed according to the facts as they existed upon the last day of presentation of claims to the receiver, and that in the exercise of a sound discretion the court should not take into consideration the fact that death had subsequently occurred in making such computation.

Held, further, that when the policies had been valued, and a dividend made which was ascertained and computed upon the facts as they existed on the day when claims were required to be presented, they should not again be revalued because a death had since occurred.

Albany Special Term, March, 1882.

MOTION in behalf of sundry policyholders to revalue policies.

Lucius McAdams, moves in behalf of some.

William Barnes, moves in behalf of others.

Raphael J. Moses, Jr., also moves to the same effect.

George W. Wingate, for the receiver, opposes.

Leslie W. Russell, attorney-general, and *John C. Keeler*, deputy attorney-general, also oppose.

WESTBROOK, J. — The present receiver, John P. O'Neil, was appointed March 31, 1877, in a proceeding instituted by the attorney-general, pursuant to chapter 463 of the Laws of 1853. Previous to such appointment, Mr. John J. Anderson, and subsequently, upon the resignation of Anderson, Mr. William R. Grace had been appointed receiver in an action commenced in the second district by John O. Hoyt, a stockholder in the corporation, for the purpose of dissolving it and distributing its assets. The history of that suit and of the proceeding of the attorney-general was given in a recent

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opinion (upon the motion of the attorney-general to file exceptions to the report of the referee upon the Anderson claim), and is also contained in that written upon the attorney-general's application to appoint a receiver, which latter opinion is reported in 53 *Howard* (page 16).

After some delay, and on the 10th day of July, 1877, Mr. Grace surrendered the assets of the company to Mr. O'Neil, the appointee in the attorney-general's proceeding, who then entered upon the discharge of the duties of his trust.

By order of the court, made November 29, 1879, the creditors of the corporation were required to file their claims on or before June 15, 1879, and subsequently, as the policy-holders of the company were very numerous (there were over 23,000) and widely scattered, parties who had not presented their claims were allowed, under certain circumstances, to present them *nunc pro tunc* prior to April 4, 1881.

The claims represented by this motion were presented to the receiver prior to June 16, 1879. They were all at that time running policies, and were valued as such in the declaration and payment of a cash dividend of fifteen per cent, which was ordered by this court October 8, 1879.

Between June 16, 1879, and January 1, 1881, the holders of the policies which these motions concern, died, and on the eighth day of January of the latter year, a motion was made for their revaluation because of such deaths.

The question presented was not free from difficulty. There would seem to be an imperative need that a date should be fixed and established, as of which all policies should be valued, for without it the task of a receiver could never be completed. My own inclination was to fix that date as of the day when the corporation passed into the hands of a receiver. It was then that the cause of action upon running policies accrued, and it seemed to me just to compute the damages due to each by the condition of facts then existing, and that no subsequent occurring event (death for instance) should be considered. In the case, however, of *The People* agt. *The Security Life*

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Insurance Company (78 N. Y., 114; *see page* 130) the court of appeals had held that there was "no embarrassment in allowing the values of policies to be computed" upon the basis of death "when the death occurs and the proofs of death are furnished at any time before the expiration of the time for presenting claims." Acting upon this decision, the court at special term, recognizing the necessity of the establishment of a day on which, according as the facts then existed, the loss to every policyholder should be computed, and the injustice which a departure therefrom might work to the holders of policies as to which death had not occurred, but which might occur in a very short time thereafter, held that the damages upon every policy of insurance should be computed according to the facts as they existed on the last day for presentation of claims to the receiver; and that as matter of law the court could not take into consideration the fact that death had subsequently occurred in making such computation.

Upon appeal to the general term of this court the order of the special term was affirmed, but the court of appeals has reversed both the special and the general term, and the original motion for revaluation of policies is now renewed. If, as was claimed by counsel for the motion upon the argument, the court of appeals have held that the relief asked should be granted, it would be alike the duty and the pleasure of the special term to award it. A careful consideration, however, of the opinion of the court of last resort as pronounced by judge EARLE, leads me to the conclusion exactly opposite to that of the counsel, and to such opinion attention is now directed.

Judge EARLE says: "There must be a period of time when the court may close all further investigation into, or allowance of, claims, when all claims upon the funds to be distributed must be deemed established, and when the court can refuse to permit claims to be altered or changed. If the court did not possess this power, great embarrassment and delay would

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attend the closing up of insolvent corporations and estates. It is a power to be exercised in view of all the circumstances. These claimants are not death claimants (*Attorney-General agt. The Guardian Mutual Life Insurance Company*, 82 N. Y., 336). All that they can claim is the value of their policies, estimated as of the date when the receiver was appointed, but in consequence of the death of the insured the actual values of their policies can be accurately determined. Here, after the sixteenth of June, the basis existed which made it possible for the claimants to prove accurately the values of their policies, and they could thus show them to be more valuable than they were estimated to be as running policies prior to that date."

The judge then proceeds to say; "Whether there should be a rehearing upon these claims upon the new proofs, which the claimants were able to give, rested in the discretion of the courts;" and that they do not "mean to intimate any opinion that the application in this case ought to have been granted by the court in the exercise of its discretion," and they remand the application "to the special term to the end that it may exercise its discretion upon the application made."

It is impossible to read, it seems to me, the opinion of judge EARL without reaching the conclusion that precisely the same reasons which induced this court at special term to hold that, as matter of law, the policies should not be revalued, were present to his mind; and if the refusal to revalue had been put upon the ground of discretion, and not upon its illegality, the decision of the special term would not only not have been reversed, but its conclusion would have been heartily approved.

The arguments which controlled the special term are as forcible to-day against the exercise of the discretion to revalue as they were when this court refused such revaluation upon the ground that it was unlawful. A dividend had already been made upon these policies, which was ascertained and computed upon the facts as they existed on the day when

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claims were required to be presented. If these policies are now revalued because a death has since occurred, and the actual duration of the insured life being known, the damages can be more accurately ascertained than when its continuance could only be estimated by probabilities, then in case of any other death which has occurred in the 23,000 lives insured the same course should be pursued. The result of this is obvious; no end could ever be reached until death had placed its final seal upon every life.

It was urged, upon the argument, that this court should only revalue the policies of those parties who asked to have them revalued, leaving all others similarly situated, and not applying for relief, without the increased dividend to which they would be entitled as well as the applicants. This suggestion cannot prevail with a court which owes to all persons the same justice. If it adopts a new principle in the valuation of policies, it should ascertain what persons are entitled to participate in its benefits, and place them upon a perfect equality. Especially should this be the rule when the receiver has, as he states to the court, informed numerous inquirers that the question which this motion involves was before the court for a decision, and if such decision was in favor of the applicants for a revaluation, they would be informed and allowed to re-present their claims.

It is, without any further elaboration, only necessary to state, in conclusion, that as the granting of these motions will create great delay in the closing of this trust, as well as perpetrate actual injustice, and as the date fixed for the valuation of the policies was a reasonable one, that the same must be denied because it would be an unwise exercise of judicial discretion.

Albert Palmer Company agt. Van Orden.

N. Y. SUPERIOR COURT.

ALBERT PALMER COMPANY agt. EDWARD VAN ORDEN.

Code of Civil Procedure, section 66 — Attorney's lien under this section extends to both costs and services, and cannot be affected by settlement between the parties — No notice of lien need be served.

An attorney's lien under section 66 of the Code extends to both costs and services, and cannot be affected by any settlement between the parties. The proper practice is for the attorney to proceed to collection of the judgment, to the extent of his lien, in the name of the client. It is not necessary to serve a notice of lien.

Special Term, November, 1882.

THE action was begun by service of a summons with notice, and the complaint was served on the defendant's attorney after appearance. Before the time to serve the answer expired the defendant settled with the plaintiff personally and obtained a receipt in full of all claims, and the defendant's attorney notified the attorneys for the plaintiff of the settlement. After notice that they would not recognize the settlement as being prejudicial to their lien for costs and services the plaintiff's attorneys entered judgment for the full amount demanded in the complaint on failure to plead, served a satisfaction of judgment, excepting and leaving the judgment standing to the amount of their lien for services and costs, and issued execution for the same. No notice of lien was served on the defendant.

The defendant made a motion that the judgment be vacated or that the default be opened.

H. B. Whitbeck, for defendant. 1st. The judgment is void because the claim on which it is based was settled before judgment. 2d. The plaintiff's attorneys have no lien because no notice of lien was served. 3d. The lien specified in section 66

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only extends to costs and does not cover the attorney's bill for services.

James B. Dill (Dill & Chandler, attorneys), for plaintiff.
 1st. The plaintiff's attorneys have a lien upon the judgment for their costs and services (*Code, sec. 66, as amended in 1879; Foreman agt. Edwards, 14 Weekly Dig., 409*). 2d. The defendant's contention that this lien is limited to costs is untenable. The Code changed the rule limiting an attorney's lien to costs and extending it to compensation for his services (*Marshall agt. Meech, 51 N. Y., 140; Wright agt. Wright, 70 N. Y., 100; In re Knapp, 85 N. Y., 284; Matter of Wilson & Greig, McCarty's Code Pro. R. [vol. 2], No. 2, p. 165*). 3d. No notice of lien is required under the Code. 4th. The practice of the plaintiff's attorneys was proper (*McCabe agt. Fogg, 11 Law Bulletin [monthly], 71*).

FREEDMAN, J. — I still adhere to the views expressed by me in *McCabe agt. Fogg*. In reading the cases cited to the contrary it must be constantly borne in mind that the amendment of section 66, which is relied on by the plaintiff's attorney, was made in 1879, and not before. The motion must therefore be denied, with ten dollars costs; but as the question is one which should be settled in this court the defendant, in case of appeal to the general term, may have a stay.

N. Y. SUPERIOR COURT.

ALBERT PALMER COMPANY agt. JAMES E. SHAW.

Code of Civil Procedure, section 543 — Complaint — Answer — Extending time in which to answer extends plaintiff's time to serve amended complaint.

By obtaining an extension of time in which to answer, the defendant extends the time of the plaintiff to serve an amended complaint.

Special Term, November, 1882.

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On the last day of defendant's time to serve an answer, he obtained an order to show cause why certain parts of the complaint should not be stricken out, and in order to show cause, obtained an extension of time in which to answer.

Before the hearing of the motion to strike out, the plaintiff served an amended complaint, which the defendant's attorney refused to accept and returned, on the ground that the same was not served within twenty days.

The plaintiff moved that the defendant be compelled to accept service of the amended complaint.

James B. Dill (Dill & Chandler), for motion. The defendant by obtaining an extension of time in which to answer, extended to the plaintiffs time to amend as of course (*Code of Civil Procedure*, 542; 11 *Wait's Pr.*, 502).

E. P. Wilder, opposed. The plaintiff's amended complaint was not served within twenty days after the service of the original, and hence the service was irregular.

TRUAX, J. — *Held*, that the plaintiff's service was regular on the principle urged by plaintiff's counsel.

SUPREME COURT.

SIPHORUS GATES, respondent, agt. MILO CANFIELD, appellant.

Code of Civil Procedure, section 3235—Construction of this section—Who entitled to costs—What is the trial of an issue of fact within the meaning of this section.

Where the plaintiff commenced an action against the defendant in a justice's court, for a trespass on lands, and the same having been discontinued by a plea of title, the plaintiff brought the present action in

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this court for the same cause, and the like defense was interposed here. The plea of title was accompanied in each court by a general denial. At the trial at the circuit, the plaintiff gave no evidence tending to the trespass alleged in the complaint, and thereupon the court, on motion of the defendant dismissed the complaint, no evidence whatever having been offered by the defendant :

Held, that the trial at the circuit was not the trial of an issue of fact, within the meaning of section 8235 of the Code of Civil Procedure, and the case is not within the exception made by this section, and the defendant and not the plaintiff is entitled to costs.

Fourth Department, General Term, October, 1882.

Before SMITH, P. J., HARDIN and HAIGHT, JJ.

APPEAL from an order of the Steuben Special Term, denying a motion to set aside a taxation of costs for the plaintiff, and to direct the clerk to tax costs for the defendant.

The complaint in this action is for a single act of trespass alleged to have been committed by the defendant on the 22d day of April, 1880, upon lands situated in the town of Fremont, Steuben county, New York. The answer is a general denial, alleges that the defendant is the owner in fee of the lands described in the complaint. The defendant had the right to assert his ownership in fee, in answer to plaintiff's allegation of possession, and was not bound to a simple issue of possession, which determined nothing to the parties of any consequence. The important issue upon which the defendant relied, and desired to have determined, and which he was prepared to try, was that of title, to the *locus in quo*, and had the plaintiff given any evidence, tending to prove the alleged trespass, or any trespass, alleged in his complaint, the defendant for answer was prepared to give evidence of his title. The trial judge held that the plaintiff had given no evidence tending to prove the act of trespass alleged in the complaint, or any trespass having been committed by the defendant, prior to the commencement of this action, and that the plaintiff had made no issue which defendant was called to answer.

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There being no issue of fact, the judge, as matter of law, dismissed the complaint. The effect of this decision precluded the defendant from giving his proofs. This result was unavoidable under the circumstances, and this question is one to be answered in determining which party is entitled to costs.

Holliday & Bingham, for appellants.

I. The defendant in this action is entitled to recover costs in his favor against the plaintiff. Section 3235 of the Code of Civil Procedure provides that the party in whose favor final judgment is rendered is entitled to costs; except where final judgment is rendered in favor of the defendant "upon the trial of an issue of fact the plaintiff is entitled to costs, unless it is certified that the title to real property came in question." This section takes the place of sections 60 and 61 of the old Code, and is evidently not intended to change the rule there provided. Section 61 provided as follows: If the judgment in the supreme court be for the plaintiff, he shall recover costs. If it be for the defendant, he shall recover costs; except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify, &c. Changing the words "upon a verdict," and substituting "upon the trial of an issue of fact," was evidently intended to cover a case where trial was by court or referee, and only contemplated the recovery by plaintiff when the decision was against him, in cases where a trial on the merits took place, and it was found no question of title was necessary for the defendant's defense. A trial of a cause of action, brought to a close by a motion for a nonsuit, is not the trial of a question of fact. What is a nonsuit? It is the relinquishment of a cause of action on the part of the plaintiff at the trial, either voluntarily or by order of the court; a failure to follow up a cause. An order or award of the court granted at the trial compelling the plaintiff to abandon the further prosecution of the action (*Burrill's Law Dic. 2d vol., p. 755*). The plaintiff may submit to a nonsuit voluntarily, or may be ordered to do so by

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the court. The construction contended for by the plaintiff's attorney would render the trial of an issue in the supreme court a mere trap. The plaintiff might bring his action in such a case, and under such circumstances as to compel a defendant to plead title, and in a case where, if the trial of an issue of fact was actually tried, he could show the title did come in question, the plaintiff will have it in his power, at all times, to obtain a bill of costs, and be substantially successful by simply submitting to a nonsuit. He may call a witness and ask, "Where do you live?" and then say, "I rest," and upon a nonsuit claim a bill of costs, which is usually the principal bone of contention in these cases. In this case there has been no "trial of an issue of fact," within the meaning of this section. No evidence has been given to establish the cause of action set out in the complaint, or any trespass before the beginning of the action. The defendant, by reason of this omission, has not given any evidence, and could not. The judgment of nonsuit is no bar to a subsequent suit for the same cause of action (*Audubon agt. Excelsior Ins. Co.*, 27 N. Y., 216). The dismissal of the complaint is equivalent to a nonsuit (6 *How.*, 618; 26 *How.*, 15; 33 *Barb.*, 357). Hence it is not, within the meaning of section 3235, a final judgment. That section being evidently intended to apply to a case where a real issue of fact is actually tried. The order that the plaintiff be nonsuited passes on no question of fact, and is made upon the ground that there is no question of fact to be passed upon; hence there has been no trial of an issue of fact.

II. The order at special term should be reversed and an order entered directing the clerk of Steuben county to tax and adjust the defendant's costs and disbursements in this action.

J. H. & C. W. Stevens, for respondent.

SMITH, P. J.—The plaintiff commenced an action against the defendant in a justice's court for trespass on lands; and

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the same having been discontinued by a plea of title the plaintiff brought the present action in this court for the same cause, and the like defense was interposed here. The plea of title was accompanied in each court by a general denial. At the trial at the circuit the plaintiff gave no evidence tending to prove the trespass alleged in the complaint, and thereupon the court, on motion of the defendant, dismissed the complaint, no evidence whatever having been offered by the defendant. Upon these facts the plaintiff claims that he is entitled to costs and that the defendant is not, and the special term has so held. The only question is whether that position is correct.

The question depends upon the construction to be given to certain words contained in section 3235 of the Code of Civil Procedure. So much of that section as is material to the question is as follows: Section 3235. "Where an action is brought before a justice of the peace * * * and has been discontinued as prescribed by law upon the delivery of an answer showing that title to real property will come in question, and a new action for the same cause has been commenced in the proper court, the party in whose favor final judgment is rendered in the new action is entitled to costs, except that where final judgment is rendered therein in favor of the defendant upon the trial of an issue of fact the plaintiff is entitled to costs unless it is certified that the title to real property came in question on the trial." Of course in this case there has been no such certificate. The question comes down to this: Was the trial at the circuit the trial of an issue of fact within the meaning of the section above transcribed? True, issues of fact had been joined by the pleadings, and such issues had been noticed and placed on the calendar and moved for trial, so that probably the party recovering costs of the action would be entitled to fee given for the trial of an issue of fact by section 3251 of the Code. But those considerations do not determine the present question, for when the plaintiff's evidence was out it was apparent that there was

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no issue of fact to be tried, and the presiding judge, thereupon, withheld the case from the jury and disposed of it upon a question of law. The defendant's motion to dismiss the complaint for the want of evidence to support it was analogous to a demurrer to the evidence; and as the motion prevailed the case was disposed of upon an issue of law without any issue of fact being tried. Section 3235 of the present Code is a substitute for section 61 of the Code of Procedure. That section provided as follows: "If the judgment in the supreme court be for the plaintiff he shall recover costs. If it be for the defendant he shall recover costs, except that upon a *verdict* he shall pay costs to the plaintiff unless the judge certify," &c.

We do not think the change of verbiage from the words "*upon a verdict*" to the words "upon the trial of an issue of fact" was intended to work the consequence contended for by the plaintiff, but it was designed merely to include the case of a trial by the court or a referee as well as that of a trial by a jury. The construction contended for by the respondent is contrary to the general policy of the statute as to costs, and if adopted would enable the plaintiff in every like case to work a fraud on the defendant by withholding his evidence at the trial of a new action.

If we are right in these views there has been no trial of an issue of fact within the meaning of the statute under consideration, and consequently the case is not within the exception made by the section, and the defendant and not the plaintiff is entitled to costs.

The order of the special term should be reversed, with ten dollars costs and disbursements, and the defendant's motion granted, with ten dollars costs.

HARDIN and HAIGHT, JJ., concur.

So ordered.

Reilly agt. Roache.

N. Y. COMMON PLEAS.

JAMES REILLY, administrator, &c., agt. MARY AMELIA ROACHE.

Husband and wife — Debt contracted by the wife as agent for her husband for the support of herself and her children — How collected — Proceedings must be against husband — Wife's property liable.

Where a wife, as the agent of her husband, contracts an indebtedness for the support of herself and her children, she is not personally liable for the debt; and where payment is sought from her separate estate the proceedings to recover for such indebtedness must be against the husband; and in those proceedings the wife's property must be devoted to the payment of the judgment against the husband.

Special Term, October, 1882.

VAN BRUNT, J. — The complaint in this action alleges, among other things, that the defendant, as the agent of her husband, Walter Roache, bought certain goods, wares and merchandise of the intestate, of whom the plaintiff is the administrator, which indebtedness was contracted by the said defendant for the support of herself and her children. The complaint further alleges that the defendant, at the time of said purchase, was possessed of certain interests in certain real estate, and prays judgment that the payment of the amount of said purchase may be made a lien and charge upon all the right, title and interest of the defendant in the said real estate.

The defendant demurs to said complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

That such an action cannot be maintained seems to be established by the decision of the court of appeals in the case of *Tiemeyer agt. Turnquist* (85 N. Y., 516). The learned judge in writing the opinion of the court in that case uses the following language :

“The section of the act of 1860 relied on has no reference

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to and makes no provision for the liability of the wife in a personal action. Its plain scope and purpose is to free her property from the control of her husband and the burden of his debts and make it her sole and separate estate. This is done with a single exception, and that is as against debts contracted by her as the agent of her husband for the support of herself and her children. As to such debts the rule of a separate estate does not apply. In that case her property is left exposed to be taken for the debt of her husband as if the statute had not been passed. But she is not made personally liable for the debt, for it is not hers but the debt of the husband. It is not her contract but his. She acts as his agent and binds him not herself. The sole effect of the provision is not to make her personally liable for her husband's debt, for not a word of such grave import is contained in the statute, but merely that the shield and protection thrown over her property against the debts of her husband shall be withdrawn in a case where his debt has been contracted, his liability incurred, through her acting as his agent, and for the purpose of providing for her own support and that of the children."

Which seems to be decisive of the point involved in this demurrer.

It is clear, if the question was an original one, that the section of the act of 1860 referred to does not create any indebtedness upon the part of the wife. It simply limits the shield which is thrown around her property, and which was intended to protect it from the debts of her husband, and the wife's property must be reached now in precisely the same way it would have been reached for the payment of the debts of her husband prior to the married woman's acts of 1848, 1849 and 1860. The proceedings must be against the husband; and in those proceedings the wife's property must be devoted to the payment of the judgment obtained against the husband for the debt contracted in the name of the husband by the wife as his agent.

It seems to me that the demurrer is well taken, and that

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the action against the wife in the first instance cannot be maintained.

It is not necessary to exhaust the plaintiff's remedy against the husband before proceeding against the wife's property; but the wife's property cannot be proceeded against independently of a suit and judgment obtained against the husband.

Demurrer sustained, with costs.

SUPREME COURT.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK agt. ISAAC E. SMITH and EDWARD A. SMITH.

Ejectment, through forfeiture under covenant in a deed — Pleading.

Certain lands were granted to defendants by the mayor, &c., of the city of New York, plaintiffs, the grantees covenanting that within three months after they "should be thereunto required by the parties of the first part," they would construct, at their own cost, in accordance with ordinances or resolutions of plaintiffs, such street or streets as fell within the limits of the lands conveyed. In 1875 a corporation ordinance was passed directing that curb and gutter stones be set, and sidewalks be flagged, on a certain street embraced within the grant; and another ordinance, subsequently passed, directed that the said street be paved, the work being required in each ordinance to be done under the direction of the commissioner of public works. In an action of ejectment to enforce a forfeiture of the grant for alleged breach of the covenant, in which these facts are alleged in the complaint, and that defendants have not done the work, or any part thereof, although six years have elapsed since they received notice of the ordinances.

Held (sustaining demurrer to the complaint), that to place the defendants in default, the complaint should have at least shown that the street was in a condition to receive the pavements and sidewalks, and that no impediment to the immediate doing of the work proceeded from any act or omission of the plaintiffs; and that notice of the resolutions and ordinances did not amount to the notice or requirement mentioned in the covenant, as the ordinances did not direct that the work was required to be done by the defendants.

The Mayor, &c., agt. Smith.

Special Term, October, 1882.

DEMURRER to complaint.

Stephen A. Walker, for defendants, in support of the demurrer.

F. A. Irish, for plaintiffs, opposed.

VAN VORST, J. — This is an action of ejectment brought by the plaintiffs to recover the possession of lands which the defendants hold, and of which they are in possession, under a grant executed by the mayor, aldermen and commonalty of the city of New York. The plaintiffs seek to enforce a forfeiture of the grant, and to recover a judgment for re-entry and possession, on the ground of an alleged breach of a condition subsequent contained in the grant. The substance of the covenants which are alleged to have been broken is given in the complaint.

The grantees, for themselves and their assigns, agreed that they should, and would within three months next after they, or any or either of them, "should be thereunto required by the parties of the first part," or their successors, at the proper cost and charges of the parties of the second part, or any or either of them, build, erect, make and finish, or cause to be built, erected, made or finished, according to any resolution or ordinance of the parties of the first part, already passed or adopted, or which might thereafter be passed or adopted, all such street or streets as fall within the limits of the premises described in the indenture, and would fill in the same with good and sufficient earth, and would regulate and pave the same and lay the sidewalks thereof.

The complaint alleges that, on the 20th day of May, 1875, a certain resolution and ordinance was adopted by the grantors, through the board of aldermen, and approved by the mayor, in the manner provided by the charter of the plaintiffs, which

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resolution and ordinance were to the effect that, on the south side of Twenty-sixth street, from the Tenth avenue to the Hudson river, and, on the north side, from the Eleventh avenue to the Hudson river, the curb and gutter-stones be set and reset, and the sidewalks be flagged a space four feet wide, through the center thereof, where not already done, "under the direction of the commissioner of public works."

The premises affected by the ordinance and resolution are embraced within the grant, and no part of the work mentioned in the ordinance and resolution had at the date of their passage been done.

Afterwards another resolution and ordinance was adopted, and approved by the mayor, to the effect that Twenty-sixth street, from Eleventh avenue to the North river, "be paved with Belgian or trap block pavement, under the direction of the commissioner of public works."

It is averred that the resolutions or ordinances were duly published pursuant to the provisions of the charter.

The complaint alleges that the defendants have not done the work or any part thereof, although six years have elapsed since they received notice of the resolutions and ordinances.

The question arises under the allegations of the complaint, as to whether the defendants are legally in default.

It is to be observed that the defendants' agreement was that they would within three months next "after they or any or either of them should be thereunto required by the parties of the first part," &c., at their proper costs and charges, do or cause to be done," the prescribed work.

There has been no requirement, except through the resolutions or ordinances. And it does not appear that the resolutions and ordinances required defendants to do the work.

They directed that the work should be done "under the directions of the commissioner of public works."

Whether the commissioner of public works has done anything, or is prepared to do anything, or has made any requirement in the premises, does not appear.

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It is quite manifest that in order that work of the character described in the ordinances and resolutions should be well and efficiently done, there is preliminary work to be done by the municipal authorities, in the way of properly adjusting the grades, after the low lands had been properly filled, if they have been in fact filled, and in determining the width of the carriage-way to be paved with the Belgian blocks, and the location of curb stones, &c., &c., and it is for that reason doubtless, among others, that the commissioner of public works is mentioned in that connection, so that the regulations of the city with regard to improvements of this nature should be observed and the work be well done.

It does not appear that the commissioner of public works has done or demanded anything to be done.

To place the defendants in actual and strict default, so as to work a forfeiture of their rights under the grant and divest them of their estate, the complaint should have at least shown that the street was in a condition to receive the pavement and sidewalks, or that no impediment to the immediate doing of the work proceeded from any act or omission of the plaintiffs, or that everything needful had been done, in so far as the city was concerned, to the immediate doing of the work by the defendants. This is the more important, when the depressed condition of the ground and the filling required to build the street, which did not exist when the grant was made, is taken into consideration.

But it is a sufficient answer to the complaint that the ordinances and resolutions of the board of Aldermen do not require that the defendants should do this work.

It is, however, alleged that the defendants had notice of the resolutions and ordinances. If the fact be as is alleged, it does not amount to the notice or requirement mentioned in the covenant. To be effective, as notices, to place the defendants in default, these ordinances should have clearly directed that the work was required to be done by the defendants. It is not claimed that the resolutions or ordinances so direct.

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The full text of the resolutions or ordinances is not given in the complaint, and if it is allowable to indulge in any presumptions with regard to their character, in the absence of any allegation in the complaint to the contrary, they may be regarded as having been adopted in the accustomed form, which merely ordains the doing of the work, and imposes no specific obligation upon owners of land on a street to do work of the character mentioned, but that the same is to be done by the city itself and its officials, the expense of which is to be apportioned by law. It was stated on the argument, by the defendants' counsel, that the ordinances are in fact of that character. But the decision is placed exclusively upon the ground that the notice or requirement contemplated by the covenant to place the defendants in default has not been given.

There should be judgment for the defendants on the demurrer, with liberty to the plaintiffs to amend on payment of costs.

SUPREME COURT.

In the Matter of the ATTORNEY-GENERAL agt. THE CONTINENTAL LIFE INSURANCE COMPANY

Reference — Mode of review of a referee's report — Practice in cases in which a referee is not to decide, but is simply empowered to take the evidence and report his opinion.

There is no necessity for filing exceptions to a report of a referee who is appointed to take the evidence and report his opinion upon a claim made against an insolvent insurance company.

The thirtieth rule of the court, as to the necessity of filing exceptions to a referee's report, has no application to a reference of this nature and character. It is only to a reference which empowers a referee to decide questions between parties that the rule is applicable, and it cannot foreclose the court from passing upon matters which such court only has power to determine.

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Ulster Special Term, March, 1882.

MOTION in behalf of the attorney-general to file exceptions to the report of Charles H. Winfield, as referee, recommending the allowance and payment to John J. Anderson, a former receiver of the defendant, of a claim for services as such receiver and counsel fees.

John C. Keeler, deputy attorney-general, for motion.

A. Schoonmaker, opposed.

WESTBROOK, J. — The present receiver of the Continental Life Insurance Company, Mr. John P. O'Neil, was appointed in a proceeding instituted by the then attorney-general of this state, Mr. Charles S. Fairchild, under and in pursuance of chapter 463 of the Laws of 1853, entitled, "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies."

Previous to such application by the attorney-general an action had been brought in the second judicial district by Mr. John O. Hoyt, a stockholder of the corporation, in behalf of himself and all other stockholders, to dissolve the same and distribute its assets. That action had proceeded to judgment, and Mr. Anderson had been appointed receiver therein, and acted as such for several months, at the expiration of which time Mr. William R. Grace was appointed, at a term of the supreme court, held in the second district by one of its judges, to supersede him.

Upon the final hearing of the application of the attorney-general for the appointment of a receiver, upon his application, the only objection made thereto was, that a receiver of the corporation had already been appointed in the second district in the Hoyt action, and that, therefore, the proceeding of the attorney-general was unauthorized. The same objection had been previously made at the very commence-

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ment of the attorney-general's application, and had been overruled by the special term, Mr. justice OSBORN presiding, and on an appeal to the general term of this court, in the third department, the decision of the special term, overruling the objections, founded upon the appointment of a receiver in the Hoyt action, was sustained. An appeal from the decision of the general term, taken by the corporation to the court of appeals, was dismissed upon the ground that the order was not appealable. The question presented was a new and important one, and because of its novelty and importance, though the decision of a previous special term and of the general term of this court would have justified the court upon the application for the final order in summarily overruling it, the judge (myself) then presiding carefully considered it, and upon granting the motion of the attorney-general wrote an opinion, which will be found in 53 *Howard's Practice Reports* (pages 16, &c., &c.), declaring the mode of closing a life insurance company as required by statute.

The order appointing Mr. O'Neil receiver in the proceeding initiated by the state, through its law officer, was not reviewed by appeal, but was acquiesced in, and Mr. Grace, the successor of Mr. Anderson as receiver, appointed in the Hoyt action, surrendered the assets of the corporation to Mr. O'Neil, the receiver appointed upon the attorney-general's application.

After Mr. O'Neil had been appointed receiver, Mr. John J. Anderson, who was the first appointee in the Hoyt action, petitioned this court to compensate him for service in that capacity, and to reimburse him for advances to counsel employed by him in the execution of his trust. This petition was resisted by the receiver, and by the counsel of various intervening policyholders, and as it involved a very long and tedious examination of the trust whilst in the hands of Mr. Anderson, which it was impossible for the judge holding the term, for want of time, to conduct, the whole matter was referred, on the motion of the then attorney-general, Mr.

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Augustus Schoonmaker, to Mr. Charles H. Winfield, a very competent and intelligent lawyer, to take the evidence, and report the same, together with his opinion thereon to the court.

The reference to Mr. Winfield occupied more than a year. An immense amount of evidence, both documentary and oral, was taken, and on the 14th day of July, 1881, the report of the referee was filed, by which the payment to Mr. Anderson of \$13,000, for his services as receiver is recommended, and for disbursements or liabilities to counsel as follows: To Mr. Robert Sewell \$10,000, to Mr. John L. Hill \$3,750, and to Mr. George W. Miller \$1,500. In addition to these, the referee, without any recommendation upon the subject, submits to the court, the question, whether or not Mr. Anderson should be allowed interest upon such \$13,000 from the date of the order making the reference, which was September 22, 1877.

A copy of Mr. Winfield's report was served upon the representative of the then attorney-general on the said 14th day of July, 1881, to which no exceptions have as yet been served or filed by the attorney-general, though the various parties intervening, and also the receiver have excepted thereto. The present attorney-general, Mr. Russell, asks permission to file and serve such exceptions now, as the attorneys for Mr. Anderson have refused to receive them.

The motion of the attorney-general is resisted upon the thirtieth rule of the court, which provides: "In references other than for trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony; and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless, exceptions thereto are filed and served within eight days after service of notice of the filing of the same.

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If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter on the notice of any party interested therein."

The answers to this objection are, in brief, these :

First. The rule has no application to a reference of the nature and character of the one to which it is sought to be applied. Mr. Winfield was not authorized to decide anything, nor could he have been. The application was to the court, as the trustee of the assets of the association, which it was administering through a receiver, for the payment of an alleged valid claim. Before ordering its payment, the judgment of the court must be convinced of its justice, and such judgment it cannot, and should not, surrender to the opinion of anyone. It may call for advice and evidence through the medium of a referee, but it must carefully examine and consider both the evidence and advice, and then pronounce and follow its own conclusion thereon.

This view of the rule is clear from its language. It declares, if exceptions are not filed, "the said report shall become absolute, and stand as in 'all things confirmed.'" To a mere advisory report such words are inapplicable, for if it is made "absolute," and is "confirmed," no more is established than there was before, and that is, that the referee has made a recommendation and submitted it to the court, with the evidence upon which it is based, leaving the tribunal, which he advises, to act according to its own conscience and judgment. It is only to a reference which empowers a referee to decide questions between parties that the rule is applicable, and it cannot foreclose the court from passing upon matters which such court only has power to determine.

Second. Even though the construction just put upon the rule be unsound, still, in the exercise of a sound discretion, the present application should be granted.

The questions to be presented are very important, and involve over \$30,000 to an estate in the hands of the court for distribution. The attorney-general is really the legal

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adviser, the *amicus curiae* of the court in the discharge of its duties. As the representative of the people, in the execution of a great trust, and not as the counsel of any party in interest, he entertains views which he desires to submit in a formal and legal manner, in the discharge of his official duties. Unless the court is prepared to ignore the official position of the applicant, and upon a mere technicality debar the law officer of the State from being heard upon questions in regard to which it needs all obtainable light, then this motion should be granted. Whilst, generally, rules should be followed by courts, yet they are not obligatory (*People ex rel. &c. agt. Nichols*, 79 *N. Y.*, 582). In the present case, sound discretion and public policy alike require that this application should prevail. As already intimated, there is no necessity for the filing and service of exceptions, but as the attorney-general, for greater caution, asks permission so to do, and as such filing and service will place on record his views, leave to do so must be granted.

It is, perhaps, proper to add that nothing in this opinion contained should be construed as reflecting upon the integrity and propriety of Mr. Anderson's claim for services and for counsel fees. Of their merit nothing is known by the court, for neither the report nor the evidence has been examined. Upon the hearing, soon to take place, they will be patiently and carefully considered; but upon such hearing the attorney-general should be permitted to enlighten the judgment and conscience of the court, and the order now made will simply give him that opportunity.

Duplex Safety Boiler Company agt. McGinness.

N. Y. MARINE COURT.

DUPLEX SAFETY BOILER COMPANY agt. CHARLES W.
MCGINNESS.*Sale and delivery of goods — Statute of frauds — Acceptance.*

In order to constitute a delivery and acceptance of goods something more than words are necessary ; and the fact that the goods are already in the defendant's possession under a prior understanding does not amount to a delivery or acceptance, There must be some affirmative act of his to take the case out of the statute.

Trial Term, October, 1882.

THE complaint charges "that the defendant on or about March 1, 1882, purchased and agreed to pay \$531.85 for a boiler then in his possession belonging to the plaintiff." The defendant answered denying that any such purchase was ever made. Upon the conclusion of the plaintiff's case the complaint was dismissed and the plaintiff thereupon moved for a new trial, and this is the application now under consideration.

*William H. Mundy, for plaintiff.**Edward J. Cramer, for defendant.*

McADAM, J. — The boiler was in the defendant's possession prior to and at the time of the alleged sale to him by the plaintiff. The price was more than fifty dollars. No part of the purchase-money was paid, and there was no contract in writing signed by either party. The sale was, therefore, void by the statute of frauds, unless the circumstances that the boiler was in the defendant's possession at the time may be regarded as a delivery and acceptance sufficient to satisfy the statutory requirement in that regard. Upon the trial the

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complaint was dismissed upon the ground that the mere circumstance of prior possession, standing alone, was not tantamount to the delivery and acceptance contemplated by the statute. This ruling was correct. There was no change of circumstance either in the parties or the goods; no change of possession, or of the character of the possession, and the defendant has done no act which can be construed into an acceptance of the boiler. He has not changed its location or condition. Never claimed it as his own. Never refused to give it up; and, in short, has neither exercised any act of ownership over it nor has he done anything inconsistent with his rights under his prior possession. To hold that there was a valid sale within the statute of frauds would be to introduce the very mischief against which that enactment was directed (*Lillywhite* agt. *Devereaux*, 15 *Mees. & Wels.*, 285; *Edan* agt. *Dudfield*, 1 *Q. B.*, 302; 1 *Adoll. & Ell. [N. S.]*, 302), for in order to constitute a delivery and acceptance of goods something more than words are necessary (*Shindler* agt. *Houston*, 1 *N. Y.*, 261).

Motion for new trial denied.

N. Y. COMMON PLEAS.

JOHN COSTER *et al.* agt. ALIDA VAN SCHALCK *et al.*

Forcible entry and detainer — Injunction will not be granted to restrain execution of warrant pending appeal — Code of Civil Procedure, sections 2283, 2254, 2265.

An injunction will not be granted to restrain the execution of a warrant issued in a proceeding for forcible entry and detainer, pending an appeal from the judgment entered in said proceeding.

Special Term, October, 1882.

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Charles W. Brook, for plaintiff.

A. H. Stoyber, for defendant.

VAN BRUNT, *J.* — This is an application for an injunction to restrain the execution of a warrant issued in a proceeding for forcible entry and detainer, pending an appeal from the judgment entered in said proceeding.

It is claimed upon the part of the plaintiffs that under section 2265 this court has authority to issue such an injunction. By section 2233 proceedings in cases of forcible entry and detainer are made to conform to summary proceedings for the possession of real property. An examination of those sections shows that in many respects they are but a re-enactment of the provisions of the Revised Statutes. Subdivisions 1, 2 and 3 of section 2254, which provides for the cases in which a party may obtain a stay, where a final order is made requiring the delivery of possession of property to the petitioner, are but a re-enactment of sections 44, 45 and 46, pages 515 and 516 of the second volume of the Revised Statutes. Section 47 provides that the supreme court may award a *certiorari* for the purpose of examining any adjudication made upon any application thereby authorized.

Instead of *certiorari* the Code provides for an appeal. The section then provides that the proceedings on any such application shall not be stayed or suspended by said writ of *certiorari*, or any other writ or order of any court or officer. It has been held that the proceedings of a landlord for the removal of the tenant can only be staid by a court of equity where it is alleged that the proceedings before the justice are fraudulent or collusive, or that the magistrate has no jurisdiction (*Shearman agt. Wright*, 49 *N. Y.*, 202). Section 2265 of the Code is but a re-enactment of the latter clause of section 47, and incorporated therein is the law as declared by the decisions of the courts. Section 2265 provides that where a petition is presented as prescribed in this title, the proceedings thereupon

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before the final order, and if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon cannot be stayed or suspended by any court or judge except in one of the following methods:

First. By an order made for an undertaking filed upon an appeal in a case and in the manner specifically prescribed for that purpose in this title.

Second. By an injunction order granted in an action against the petitioner. Such an injunction shall not be granted before the final order in a special proceeding, except in the case where an injunction would be granted to stay the proceedings in an action of ejectment brought by the petitioner upon like terms, or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action and upon the like terms.

The only provision made by the Code for a stay of summary proceedings upon appeal is in the case where the lessee or tenant holds over after a default in the payment of rent. There is no provision for a stay upon an appeal in the case of a tenant holding over after expiration of term, or in the case of forcible entry or detainer, unless it is found in subdivision 1 or 2 of section 2265. The language of subdivision 2 does not give the court any general power to enforce the execution of a warrant, but simply provides that such injunction may be granted in a case where an injunction would be granted to stay the execution of the final judgment in an action of ejectment and upon the like terms. This is merely declaratory of an equitable jurisdiction which the courts had long exercised and which depended upon allegations of fraud or collusion in the proceedings, or that the magistrate had no jurisdiction.

There is no pretense in the case at bar of fraud or want of jurisdiction, but simply that the magistrate has committed errors in the proceedings which render them void.

Prior to the adoption of the Code these errors could only be reviewed upon *certiorari*; now they can be reviewed upon appeal, but I can find no authority given to the court by any

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provisions of the Code, nor can I find that the court ever, prior to the adoption of the Code, had claimed any power to restrain by injunction the execution of the warrant in such proceedings, except for fraud or want of jurisdiction. In fact, the section of the Revised Statutes above referred to prohibits such intervention upon the part of the court; and section 2265 is equally positive in its terms, except that it reserves the right to a stay in certain cases by subdivision 1, and to an injunction in certain other cases mentioned in subdivision 2, neither of which subdivisions authorize this court to issue the injunction prayed for herein.

As to whether the judge who tried the proceeding has the power to stay the execution of the warrant by order, upon the giving of an undertaking or otherwise, by virtue of the provisions of subdivision 1 of section 2265, it is not necessary that I should express an opinion, as the decision of that question is not necessary to the disposition of this motion.

I am of the opinion, therefore, that this court has no power to issue the injunction prayed for, and that the temporary injunction should be dissolved, with costs.

SUPREME COURT.

THOMAS E. CRIMMINS, appellant, agt. JENNIE O. CRIMMINS,
respondent.

*Divorce — In favor of the husband on the ground of the adultery of the wife —
She ceases to have any right to the care or control of the minor child — Court
no jurisdiction to alter or amend the terms of the final decree.*

Where a decree of divorce is granted upon the application of the husband for the reason of the adultery of his wife, she ceases, whether or not the decree awards the custody of the children to the father, to have any right to the care, control, education or companionship of the minor

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children; and the court has no jurisdiction after final judgment to enjoin upon the husband or the children the company of the woman who has violated her marriage vows.

First Department, General Term, November, 1882.

Before BRADY, DANIELS and BARKER, JJ.

THIS is an action for a divorce *a vinculo*. The complaint charged the defendant with having committed adulteries, and demanded a dissolution of the bonds of matrimony, and that he be awarded the custody of an infant child, a daughter of the age of about eight years. The bill was taken as confessed. In the final decree, the custody of the infant child was awarded to the plaintiff. The action was commenced on the 3d day of December, 1878, and the final decree entered January 7, 1879. In February, 1882, the defendant presented her petition to this court, wherein she recited the proceedings had in the divorce suit, and that the infant child was now living with the plaintiff in the city of New York; and that she upon two occasions requested her former husband, Thomas E. Crimmins, to allow her to see the child, and that he has refused such request, and will not permit her to see and visit the child under any circumstances; and that she is very anxious to have that opportunity, and prays that the decree of divorce be amended by inserting therein a clause permitting the petitioner to see her said child from time to time, and in such way and under such circumstances as to the court may seem proper; and for such further and other relief as may appear to be proper under the circumstances.

In an affidavit accompanying the petition, she states, among other things, that since she was divorced from her husband she has led a perfectly domestic and proper life.

The plaintiff appeared in opposition to the granting of the motion, and read affidavits tending to show that the defendant had not reformed, and was still living an improper and adulterous life. The court, at special term, made an order referring it to a referee to take proof, and report to this court

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as to the conduct of the defendant since the granting of the divorce herein, and whether her life since that time had been free from blemish, and such as to justify a belief in her reformation. From this order the plaintiff appeals to this court.

Henry R. Beekman, for appellant.

Charles P. Miller, for respondent.

BARKER, J. — In this state, when the marital relation is terminated by a decree of this court, the subsequent relation of the parties to each other is the same as though no marriage between them had ever occurred; and they have no claim upon each other growing out of the former relation of husband and wife, except such as may be given to them by the judgment of separation (*Kamp agt. Kamp*, 59 N. Y., 212).

When the decree of divorce is granted upon the application of the husband for the reason of the adultery of his wife, she ceases to have any right to the care, control, education or companionship of the minor children. This is so whether the final decree awards the custody of the children to the father or is silent on that subject.

The court has no jurisdiction, on the petition of the wife after final judgment, to enjoin upon the husband or the children the company of the woman who has violated her marriage vows. The idea that the court should interfere and impose upon the former husband the duty of admitting within the privacy of the family his divorced wife is repugnant to every sentiment of virtue and propriety. The father at all times is regarded as the head of the family, and may establish his home at such place as his interest and inclination induce him to select; and he is entitled to the care and custody of his children, with the right to provide for their education and to demand their services. This is subordinate, however, to the interests of the children and to the rights of

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the public, and the privileges of the husband may be interfered with when his life, habits or misbehavior make a proper case for judicial interference. Whenever the father's misconduct is such that an interference is demanded, and the marital relation continues between the father and the mother, she is often selected as the most suitable person to have the custody and management of the minor children; and the husband's authority and privilege is limited and controlled according to the circumstances and features of each particular case. When the mother is selected it is based upon the natural supposition that her virtues, and the affection which she has for her children, qualify her for the discharge of this duty. But when she is divorced from her husband, and her family broken up by reason of the sins of her life, she is justly deprived of the favor and privilege for which the petitioner now prays.

There is no law nor custom for upholding the proceeding which the petitioner has instituted. It is not based upon the suggestion that there was any irregularity or mistake in entering the final decree with the provision that the custody of the child be given to the father.

This matter might very well be dismissed without further consideration upon the suggestions already made; but the provisions of the Revised Statutes upon the subject of divorce being in confirmation of the views which we have already expressed, they are referred to in support of the order which we direct.

Section 59, chapter 8, is as follows: "In any suit brought by a married woman for a divorce or for a separation from her husband, the court in which the same shall be pending may, during the pendency of the cause or at his final hearing, or afterwards, as occasion may require, make such order, as between the parties, for the custody, care and education of the children of the marriage as may be necessary and proper, and may at any time thereafter annul, vary or modify such order."

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This section and its provisions are limited to cases where the wife applies for a divorce or a separation and the husband is the guilty party, conferring upon the court the power to take away from the husband the care, custody and education of the children for the reason of his adultery or on account of his cruelty or misbehaviour to his wife.

The section has no application whatever in a suit where the husband is the plaintiff, charging his wife with infidelity; nor was it necessary that the statute should provide for the custody of the children as between the father and the mother, for if the father should succeed in maintaining the accusations upon which his suit is based, in that event he would be in the full and complete enjoyment of his common law privileges as the head of the family, and father of the children, independent of any interference on the part of his divorced wife.

It was urged on the argument by the learned counsel for the plaintiff, that as the final decree awards the custody of the child to the father, that it is binding upon the defendant, and that this court has no jurisdiction to interfere on an application of this character.

We are of the opinion that it was a question which the court had jurisdiction to determine, as between the father and the mother, awarding the custody to the father and depriving the mother of any interference with the care, custody and education of the child, and falls within the case of *Kamp* agt. *Kamp* (*supra*), holding that the court has no jurisdiction to interfere and alter or amend the terms of the final decree.

The order of the Special Term is reversed.

BRADY and DANIELS, JJ., concur.

Bernard agt. Morrison.

SUPREME COURT.

HENRY O. BERNARD agt. HENRY MORRISON.

Pleading — Answer — Demurrer — Defendant may not answer and demur to same cause of action — May be compelled to elect whether to answer or demur.

Where a paper served as an answer is clearly an answer and demurrer, the defendant may be compelled to elect whether he will abide by his answer or demurrer.

Special Term, October, 1882.

MOTION to compel defendant to elect whether to answer or demur to the complaint.

E. J. Myers, for plaintiff for the motion.

John Graham, for defendant.

POTTER, J.— This is a motion to compel this defendant to elect whether he will abide by his answer or demurrer. The paper served as an answer to the amended complaint is clearly an answer and demurrer. It is in the words of subdivision 8, section 488. Where there is but one cause of action the defendant may answer or demur, but he may not answer and demur to the same (*Sec. 487 and 492*).

The remedy to compel an election in such case is proper (*Sec. 492 Code, and the numerous cases in the references in Bliss' Code under sec. 492*).

There is no occasion or propriety to pass upon the various objections made to defendant's answer for want of certainty, &c., if defendant elects to stand on his answer, for it may be that he will elect to abide by his demurrer, and in that event his answer will disappear from the case.

Motion to compel election granted, with ten dollars costs of motion.

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SUPREME COURT.

SAMUEL MORRIS agt. DANIEL J. WHELAN.

Office and officer — How title to a public office to be tried prior to and since the adoption of the Code of Civil Procedure — Code of Civil Procedure, sections 1948, 1949, 1955, 1984.

Prior to the adoption of the present Code of Civil Procedure, it was well settled that the title to a public office in this state could only be tried in an action brought in the name of the people of the state by their attorney-general.

Under the Code of Civil Procedure, the people are necessary parties to an action to try the title to an office. The rule is the same where the title is to be tried indirectly, as in an action to enjoin the incumbent. Section 1948 expressly provides that such an action must be brought in the name of the people of the state.

An office is not the property of an individual, but of the people. They have an interest in the exercise of its functions, and no court should, without giving them an opportunity to be heard, undertake to decide what individual must possess its emoluments and discharge its duties, even for a single hour.

Where a person usurps or "*intrudes*" into a public office, civil or military, and the attorney-general brings his action to oust him, no injunction can be obtained *pendente lite*; nor can a party who, as is conceded, has no right to bring an action to test the title, obtain a relief (i. e., an injunction), which the people cannot be afforded.

Special Term, June, 1882.

APPLICATION for an injunction to restrain the defendant from acting as president of the common council of Troy.

Townsend & Roche, for motion.

R. A. Parmenter, opposed.

WESTBROOK, J. — The plaintiff claims that at the regular annual meeting of the common council of the city of Troy, held on the Tuesday succeeding the second Monday of November, 1881, he was regularly and legally elected to the presidency thereof. That he accepted said office, and proceeded

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to discharge its duties, and became thereby *ex-officio* a member of the contracting board, and as such entitled to an annual salary to be fixed by said board, not exceeding \$800.

That as president of the common council he presided at its meetings, appointed its committees, and has frequently been recognized as such president by said contracting board, and the authorities of the city.

That on the 16th day of March, 1882, while the plaintiff was attending a meeting of the common council, and undertaking to act as its president, the defendant assumed to call the meeting to order, and directed that no attention should be paid to the plaintiff. That thereupon the plaintiff, as he alleges, seeing that there was no quorum present, declared the meeting of the common council adjourned, and proceeded to leave the room, which he was prevented from doing by order of the defendant.

The plaintiff then avers that the defendant acted as he did upon the assumed claim that he (the defendant) had been elected president of the common council, the truth of which the plaintiff denies, but avers on the contrary thereof that he, the plaintiff, is still the incumbent of the office.

The plaintiff then asks that as the payment of claims against the city, audited at a meeting of the common council, presided over by the defendant, will be resisted, as further attempts by the defendant to act as president of the common council will produce "much violence and unseemly conduct at said meeting, and confusion and disorder in the public and governmental affairs of said city," and as the action of the defendant may interfere with the obtainment by the plaintiff of his salary as a member of the contracting board, that the plaintiff may have "judgment against the defendant, that the defendant be enjoined and restrained from discharging or attempting to discharge the duties, or exercising or attempting to exercise the powers of the office of president of the common council of the city of Troy during the period ending on the Tuesday succeeding the second Monday of November next, or in any

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manner interfering with the plaintiff in the discharge of the duties thereof, and for the costs of the action, and that in the meantime," the defendant may be so restrained and enjoined by the order of the court.

The defendant, by his answer, denies substantially all the allegations of the complaint. He specifically denies that the plaintiff was ever elected president of the common council, and insists that such pretended election was accomplished by recognizing as members of such council James Morrissey and Richard H. Van Alstyne, who were not aldermen of the city; that an alleged quorum of the common council was also obtained at subsequent pretended meetings thereof, presided over by the plaintiff, by recognizing said Morrissey and Van Alstyne as members thereof; that the term of the office of the president of the common council is not fixed by law, and continues only during the will of a majority of its members; and that while the plaintiff was usurping the office, on the first Thursday of March, 1882, at a regular meeting of the common council, by the votes of "fourteen regularly duly elected aldermen, all holding proper credentials and having duly qualified," he was made president of such common council. The proceedings of such meeting are detailed in the answer at some length.

That since such election the defendant has been in full possession of the office of president of the common council, exercising its duties, recognized as such by all the officers of the city government, and the ordinances and proceedings of that body, presided over by the defendant, have been respected and obeyed as such "by all the departments of the said city government."

The allegations of the answer are sustained by the affidavits of thirteen persons, who are alleged to be aldermen, and also by the affidavit of Charles R. De Freest, the city clerk of the city of Troy, which have been read upon the present motion for an injunction *pendente lite*.

From the foregoing statement of the moving and opposing

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papers, it is evident that it is impossible to determine with any accuracy the facts upon which the title of the parties to the office of president of the common council depends. Such an attempt will not be made, for, in the view which I have taken of this action, it would only be the expression of an opinion upon the occupancy of and title to an office which cannot be settled in the present suit.

From the relief demanded in the plaintiff's complaint, as well as from all its allegations, it is also evident that the question which it seeks to present is the title to the office of president of the common council of the city of Troy. Prior to the adoption of the present Code of Civil Procedure, to the provisions of which reference will presently be made, it was well settled that the title to a public office in this state could only be tried in an action brought in the name of the people of the state by their attorney-general (*City of Buffalo* agt. *Mackey*, 15 *Hun*, 204; *People* agt. *Ferris and Lyon*, 16 *Hun*, 219). In the last cited case, which was a proceeding by *mandamus* to prevent Lyon from acting as president of the board of trustees of the village of White Plains, to which Lyon claimed he had been elected, and is therefore the identical case now presented, it was held that the *mandamus*, which would operate as an injunction, should be denied, and that "the remedy prescribed by law for determining the title to an office is an action in the nature of *quo warranto*." The Code of Civil Procedure, however, contains explicit provisions upon the subject, and to these provisions reference is now made.

By the first subdivision of section 1948, the attorney-general is authorized to maintain an action "against a person who usurps, intrudes into, or unlawfully holds or exercises, within the state, a franchise, or a public office, civil or military, or an office in a domestic corporation."

Section 1949 provides: "In an action brought as prescribed in the last section for usurping, intruding into, unlawfully holding or exercising an office, the attorney-general, besides

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stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court or judge."

Section 1984 requires the action to be brought in the name of the people.

It is worthy of note, too, that while the Code has made provisions for an action to test the title to an office, and has provided for the arrest of the defendant if he is receiving the fees and emoluments of the office, and has also provided for an injunction (*sec.* 1955) in a case brought under subdivision 3 of section 1948, which is the same section under which the title to an office can be tried in an action brought by the attorney-general, it does not explicitly give an injunction pending the action against the (to use the words of subdivision 1 of said section 1948), "person who usurps, intrudes into, or unlawfully holds or exercises, within the state, a franchise, or a public office, civil or military."

The provisions of our present Code are not new (2 *Edmond's Statutes*, 603; *old Code* *sec.* 482; *Throop's note to sec.* 1948 of present Code), and the absence of any provision authorizing an injunction in an action brought by the attorney-general, when in another action instituted by him under the same section that power is expressly conferred, is significant to show that the old rule so long established, that temporary injunctions pending an action brought to try the title to an office (*Tappan agt. Gray*, 9 *Paige*, 507; *same case in court of errors*, 7 *Hill*, 252; *The Mayor agt. Conover*, 5 *Abbott*, 171; *The People agt. Sampson*, 25 *Barbour*, 254; *Hartt agt. Hawley*, 32 *Barbour*, 55) was intended to be preserved under the present Code, even when the action was brought by the attorney-general.

As to the intention of the enactments of the Code providing

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for actions by the attorney-general, its compiler has left us in no doubt, for in his note to section 1949 he says: "The people are necessary parties to an action to try the title to an office (*City of Brooklyn agt. Mackey*, 15 *Hun*, 204). *The rule is the same when the title is to be tried indirectly, as in an action to enjoin the incumbent (N. Y. Juvenile Guardian Society agt. Roosevelt*, 7 *Daly*, 188; *People agt. Ferris*, 16 *Hun*, 219; see sec. 1984, *post*)."

That section (1984) to which he refers, expressly provides that such an action "must be brought in the name of the people of the state."

The reason for the rule is obvious. An office is not the property of any individual, but of the people. They have an interest in the exercise of its functions and no court should, without giving them an opportunity to be heard, undertake to decide what individual must possess its emoluments and discharge its duties even for a single hour.

It is said, however, in behalf of the plaintiff, that as he is in possession of the office, he has the right to an injunction to restrain the defendant from interfering with him in the discharge of its duties. To substantiate this proposition *Palmer agt. Foley* (36 *N. Y. Supr. Ct. R.*, 14) is cited. It is true that in that case a majority of the superior court (judges MONELL and FREEDMAN), held, a minority (judge CURTIS) dissenting, that the plaintiff, as the incumbent of the office of deputy chamberlain of the city of New York, was entitled to an injunction against the defendant, restraining him from interfering with the plaintiff in the discharge of its duties. That decision, however, cannot be adopted as the law of this case, because,

First. The incumbency and possession of the office by the plaintiff, at the time of the institution of this action, is denied. Since the alleged election of the defendant in March last, he, at least, claims, and the papers submitted upon this motion are certainly very corroborative of such claim, that he has been in the exclusive possession of the office of president of the common council of the city of Troy, exercising its func-

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tions and recognized as the rightful incumbent thereof by the officials of the city.

Second. The relief sought in this action — the enjoining of the defendant from acting as president of the common council until the expiration of the term for which the plaintiff claims to have been elected — must involve the trial of the title to the office itself. If the plaintiff is not the *de jure* president, he certainly should not be maintained in possession by an injunction, simply and only because he is in possession.

It is no answer to this argument to say, that as the possessor of the office the plaintiff is simply seeking to keep out an intruder, and therefore the issue of title to the office itself is not presented. This view is fallacious, because the fact that the defendant is an intruder cannot be assumed, but must be proved; and the attempt to prove it must involve an inquiry into the title to the office. In short, however specious the argument to distinguish this action from one brought to recover the office itself is, it is apparent that the attempt is after all to indirectly try the title thereto, which cannot be done unless the people are parties (*Throop's note to section 1949 of the Code, and cases there cited*).

Third. It has already been shown that when a "person usurps or intrudes into * * * a public office, civil or military" (*Code's sec. 1943*), and the attorney-general brings his action to oust him, no injunction can be obtained *pendente lite*; and it would be a little remarkable if a party who, as is conceded, has no right to bring an action to test the title, could obtain a relief which the people cannot be afforded. The case cited and relied upon by the plaintiff cannot, as it seems to me, be sound, because it is placed by the majority of the court upon the ground that when a defendant is a *usurper* and *intruder* into an office its possessor may have the remedy of an injunction. This is in conflict with the Code, which in such cases gives the remedy to the attorney-general only, and does not, as has just been said, give him the right to an injunction.

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Fourth. The alleged disturbance of the public peace, and violence, which are said to be feared if the injunction is not granted, furnish no reason for its issue. Criminal proceedings can be instituted for a violation of law, and afford an ample remedy (*Burch agt. Cavanaugh*, 12 Abb. [N. S], 410).

Fifth. If the defendant undertakes to draw the salary to which the plaintiff declares himself entitled, the Code (*sec.* 1949) provides a remedy, if an action is brought in proper form and by the proper parties.

In concluding this opinion in denial of the plaintiff's motion for an injunction during the pendency of this action, it seems to me proper to say there is no reason apparent to my mind why this controversy cannot be speedily settled by a trial. There is a circuit soon to be held in the county of Rensselaer. By consent of parties, who both profess to be desirous of a rapid legal decision, an action can be brought by the attorney-general and then and there tried. If parties do not consent, that circuit can be adjourned to a day in the future, when an issue made in the attorney-general's action can be noticed for trial and disposed of. This course will present the questions involved in the contests of these parties without embarrassment, so that they can in due form of law be settled. The machinery of the law is certainly ample to afford speedy redress, for even though there was no circuit to be held in the county of Rensselaer, near at hand, the governor can convene an extraordinary term for the purpose of disposing of these important questions—important to the parties, to the citizens of Troy and to the people of the State.

Wright agt. Field.

N. Y. SUPERIOR COURT.

ALFRED Y. WRIGHT agt. CLINTON O. FIELD.

Arrest — Order of must be vacated where complaint fails to state cause of action — Complaint — In action to recover damages for conversion of certificates of stock what should be alleged in.

The complaint alleged, in an action for conversion, that "plaintiff deposited for safe keeping with the said defendant, as plaintiff's broker, certificates for 1,000 shares" of mining stock, "and the said defendant thereupon accepted the custody of said stock certificates, and promised and agreed to and with the plaintiff to keep the said stock for the plaintiff, and to hold the same for the plaintiff subject to the plaintiff's orders and instructions:"

Held, that an order of arrest granted in the case must be vacated, because the complaint fails to state a cause of action, in that there is no allegation of ownership by the plaintiff of the certificates of the stock.

Special Term, October, 1882.

MOTION to vacate order of arrest.

M. B. Field and *Daniel E. Sickles*, for motion.

Richards & Brown, opposed.

VAN VORST, J. — This is a motion to vacate the order of arrest in this action. The motion is founded upon the complaint exclusively. The ground urged by defendant's counsel in support of the motion is that the complaint does not state facts constituting a cause of action. It is provided in the Code of Procedure, in substance, that the order of arrest must be vacated if the complaint fails to state a cause of action (Sec. 558). The action is to recover damages for the alleged conversion of certificates of stock in a mining company.

Several objections are taken by the defendant's counsel to the sufficiency of the complaint, but it will not be necessary to examine more than one of them. The complaint alleges "that on or about the 10th day of May, in the year 1882, the

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plaintiff deposited for safe keeping with the said defendant, as plaintiff's broker, certificates for one thousand shares of the capital stock of the Robinson Consolidated Mining Company, and the said defendant thereupon accepted the custody of said stock certificates, and promised and agreed to and with the plaintiff to keep the said stock for the plaintiff, with all due and reasonable care, and to hold the same for the plaintiff subject to the plaintiff's orders and instructions." The complaint then alleges that, without the plaintiff's knowledge or consent, the defendant fraudulently sold the stock and delivered the same, and the certificates thereof, to the purchasers, and that the proceeds were embezzled and fraudulently misapplied by the defendant to his own use.

The point of the defendant's objection is, that there is no allegation of the ownership by the plaintiff of the certificates or the stock.

The objection is well taken. The action of trover lies for the recovery of damages for the wrongful conversion of personal property to which the plaintiff has title, either absolutely or specially (*Graham's Practice*, 88).

The Code requires that the facts out of which the cause of action arises should be stated, and that the action should be prosecuted in the name of the person who has the interest in the property the subject of the action. The complaint should distinctly disclose the plaintiff's interest in the subject-matter. In an action for conversion of personal property the plaintiff's interest, whether absolute or special, should appear by the complaint. That is clearly necessary in a case for the conversion of property such as is here involved. Pleadings cannot be upheld by implication in the pleader's favor, unless they be absolutely necessary. The fact that the plaintiff had the certificates of the stock in his possession, and had deposited them with the defendant for safekeeping, does not necessarily show that the title was in him, or that he was in truth the owner, or had a property general or specific in the certificates or stock. One may hold a certificate for shares of stock,

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and yet have no interest or property in the stock. As to the person in whom the property or interest was vested, would depend upon the registry of the stock or whose name appeared upon the face of the certificate as the owner. Stock is not transferred by a mere delivery of the certificates therefor. Something more is required. In the *Onondaga Trust Company* agt. *Price* (87 N. Y., 549), it is said by RAPALLO, J., that shares of stock are incapable of manual possession; "the shares are a description of property of which the possession must be deemed to follow the title and cannot exist separately." The possession of one who holds an ordinary chattel or a promissory note payable to bearer, is presumed to be lawful; but such presumption is not applied to the holder of certificates or shares of stock, unless the same stands in his name or is accompanied by documentary evidence of a transfer. I do not mean to be understood, however, as urging that it is necessary to allege in a complaint the manner or source of the plaintiff's title to shares of stock in order to enable him to maintain an action for conversion. It would doubtless be sufficient to allege that he was the owner or lawfully entitled to the possession.

In Mr. Moak's edition of Van Santvoord's Pleadings (*page* 213, *marginal*, 274) it is said that, in an action for damages for the conversion of personal property, "The old requisites of the declaration as to matters of substance are still preserved. The complaint should state that the plaintiff was possessed of the goods, as of his own property, and a general allegation of ownership is sufficient."

And Mr. Abbott, in his volumes of Forms and Pleadings under the Code (*volume* 1, *page* 457), gives the method of statement in this way: "That the plaintiff was lawfully possessed (or was entitled to the immediate possession) of the goods as his property" (*Selwyn's Law of Nisi Prius*, vol. 2, [13th ed.], *pages* 1276, 1288).

The question under consideration is not one of proof on the trial, but one of pleading exclusively. The precise point

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was decided in *Schofield* agt. *Whitelogge* (49 N. Y., 259). It is true that the question which arose there was in an action for the claim and delivery of personal property. But I apprehend that no different rule applies in an action for conversion in this regard (*Vander Minden* agt. *Elias*, 36 Sup. Ct. R., 66).

It is, however, urged by the plaintiff's counsel that by the agreements between the parties the defendant undertook to hold the property for the plaintiff, and that by such agreement the plaintiff acquired a special property in the certificates.

This is not an action for damages for a breach of contract. The action is brought for the conversion. If the plaintiff was not the owner, or lawfully entitled to the possession, in virtue of a general or special property therein when the deposit with the defendant was made, such deposit of itself could not constitute him such owner. The title in truth could be no better after the deposit than before.

The motion to vacate the order of arrest should be granted.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE METROPOLITAN TELEPHONE AND TELEGRAPH COMPANY.

Nuisance — Are telegraph poles and wires a nuisance — Who may maintain an action for the removal of a nuisance — Jurisdiction and practice of the court in actions in which both legal and equitable relief is demanded, directed to be tried at the circuit — Nonsuit — When not to be granted.

An action may be maintained by the people of the state, through the attorney-general, for the removal of an alleged nuisance, and for an injunction restraining its continuance.

Where an action in which both legal and equitable relief is demanded in the complaint, is directed to be tried at a circuit court, and the jury have passed upon the questions of fact, it is appropriate and competent for the circuit judge to render a judgment, not only for the damages

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found by the jury, but also restraining the defendant from the further continuance of the nuisance.

If there is any evidence, however slight, tending to prove the plaintiff's cause of action, the rule is that it is not within the power of the court to dismiss the complaint or order a nonsuit. Nor can the court grant a nonsuit on the assumption that the plaintiff's witness is not to be believed. Furthermore, in determining the propriety of a nonsuit, the court is legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduces to prove, although their correctness may be controverted by the defendant's witnesses.

While it may be lawful and proper for a telegraph company to erect and construct a telegraph line through the streets of a city, it must be constructed so as not to incommode the public use of the street, and the fixtures and poles erected must be necessary.

In an action brought by the attorney-general in behalf of the people against a telegraph company for the purpose of obtaining both legal and equitable relief, to wit, to restrain and abate the alleged nuisance, and for damages for the injury alleged to have been sustained therefrom:

Held, that if the plaintiffs should succeed in establishing, to the satisfaction of the jury, that the poles in question do incommode the public use of the street in an unnecessary and unreasonable manner, not warranted by the statute, the plaintiff will be entitled at least to recover nominal damages, and a nonsuit is properly denied if the evidence shows that the plaintiff is entitled to recover even nominal damages.

N. Y. Circuit, October, 1882.

Attorney-General Russell and L. E. Chittenden, for plaintiff.

Burton N. Harrison, for defendant.

LAWRENCE, J. — When the trial of this action was adjourned last week, a motion was pending, on the part of the defendants, for a dismissal of the complaint on various grounds, some of which related to the jurisdiction and practice of the court, some to the form of the proceeding, and some to the evidence adduced by the plaintiffs to sustain their alleged cause of action. I will briefly examine the various grounds of the motion, as thus classified by me. In the first place, I under-

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stand it to be contended by the learned counsel for the defendant that all the cases cited by the defendant were suits in equity, and that this court has no jurisdiction in equity. By a reference to the complaint it will be seen that the action is brought for the purpose of obtaining both legal and equitable relief, to wit, to restrain and to abate the alleged nuisance, and for damages for the injury alleged to have been sustained therefrom. The case, it appears, was originally placed upon the special term calendar, but, after examination, the learned justice there presiding directed it to be tried at circuit. This I regard, in substance and effect, as a direction that all the issues be tried at circuit. If this view is correct, the case of *Parker agt. Lanney* (58 N. Y., 469) is directly in point. That was an action brought to recover damages for alleged wrongful acts amounting to a nuisance, and to restrain the continuance thereof, and, the case being on the special term calendar, the defendant demanded that it be tried by a jury, and the court so ordered. The case was tried before a jury, and a verdict rendered for the plaintiff for twenty-five dollars damages. The trial judge thereafter found certain additional facts as to the location of the premises and the extent and character of the acts complained of, and ordered judgment for the plaintiff perpetually restraining the defendants from the further commission of those acts, with the damages found by the jury, and costs to be taxed. The general term reversed the order denying a motion on the part of the defendants to set aside the findings and decision of the court, the judgment and all other proceedings subsequent to the verdict, and set aside said findings, and also ordered the cause to be moved at the special term on the equitable cause of action set forth in the complaint. On appeal, by both sides, to the court of appeals, it was held that "the verdict of the jury necessarily finds that the defendants had committed some or all of the acts charged, presumptively all, and that such acts did produce the injurious result to the plaintiff's house, as charged. It, therefore, said the court, authorized a judgment restraining

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said acts. Such judgment was, therefore, properly ordered by the court. * * * * The judgment being authorized should stand as final between the parties."

The court, therefore, reversed the order of the general term, and affirmed the order of the special term, so far as it denied the defendants' motion to set aside the judgment; and it held that it was irregular for the trial judge to find additional facts, upon which, together with the verdict, judgment should be given. This case plainly holds that where an action, in which both legal and equitable relief is demanded in the complaint, is directed to be tried at a circuit court, and the jury have passed upon the questions of fact, it is appropriate and competent for the circuit judge to render a judgment not only for the damages found by the jury, but also restraining the defendants from the further commission or continuance of the nuisance. I regard the case as conclusive authority for the position, that should this case be submitted to the jury, and a verdict found in favor of the plaintiffs, it would be competent for me not only to render a judgment for the abatement of the nuisance, and for the damages which might be found by the jury, but also a judgment restraining the continuance of the nuisance. If this action is to be regarded both as legal and equitable in its character, then the case of *The People agt. Vanderbilt* (26 N. Y., 287) is an authority which holds that an action may be maintained by the people of the state, through the attorney-general, for the removal of an alleged nuisance, and for an injunction restraining its continuance. It is, however, contended by the learned counsel for the defendant, that this being a proceeding by the people, an indictment or an information are the only remedies to which the public can resort for a redress of their grievances. I was very much⁹ inclined, when the point was first presented, to sustain that view of the case, on the authority of the *The People agt. The Corporation of Albany* (reported in 11 Wend., 543); but on the authority of the more recent cases to which I have referred, and regarding this case as both

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equitable and legal in its character, I am of the opinion that the objection cannot be sustained. These conclusions lead me to the consideration of the objections which were taken by the counsel for the defendants to the character and effect of the evidence given by the plaintiffs for the purpose of establishing their alleged cause of action. Now it must be conceded that the defendants in this case start (assuming them to be a telegraph company) with a strong presumption in their favor. The statutes of this state provide for the formation of telegraph companies, and authorize them "to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers and abutments for sustaining the cords or wires of such lines, provided the same *shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters, nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this state* (2 R. S. [6th ed.], 633, sec. 5.) See, also, 2 Revised Statutes (page 635), where power is given to a telegraph association or company to erect and construct, from time to time, the necessary fixtures for such lines of telegraph upon, over or under any of the public roads, streets and highways, and subject to the restrictions in the said recited act contained. The first provision is from the Laws of 1848, chapter 265, and the second from the Laws of 1853, chapter 471, amending the act of 1848. The defendants were duly organized under those statutes and they have obtained from the superintendent of incumbrances, the chief officer of the bureau of incumbrances in the department of public works, a permit authorizing them to erect a line of telegraph poles in this city. The erection of telegraph poles in Twenty-first street cannot, therefore, be deemed *per se* a nuisance. On the contrary, *prima facie*, the erection of poles in said street by the defendants would be legal, because that which the lawful authority permits can

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never be a nuisance (*See Davis agt. The Mayor of New York*, 14 N. Y., 524, 525; and *Easton agt. The New York and Long Branch R. R. Co.*, 24 N. J., 49). But the plaintiffs contend that while it may be lawful and proper for the defendants to erect and construct a telegraph line, it must be constructed so as not to incommode the public use of the street, and that the fixtures and poles erected must be necessary, and they claim that in consequence of the height and size of the poles in question, the public use of said street is incommoded, and that said poles as constructed are unnecessary. If this be true in point of fact, it cannot be said that the erection of the poles by the defendant is a lawful act, nor can the doctrine laid down in the cases to which I have just referred be invoked to defeat this action. It has frequently been held that whether an alleged encroachment upon a public or private right is a nuisance or not is a question of fact (*See People agt. Horton*, 5 Hun, 520, *opinion of GILBERT, J.*). The learned counsel for the defendant claims that as by the evidence of Mr. Brooks, it appears that at the time when these poles were erected, there was no one in the United States of America who could construct a subterranean telegraph, the witness being himself then in Europe, that there is no evidence to go to the jury upon the question of nuisance; and I understand him to argue that the testimony of Brooks entirely overcomes any opinion which the witness Chester may have expressed as to the feasibility of constructing a subterranean line. Even if this be so, there is evidence in the case, slight, perhaps, and vague in its character, tending to show that poles much smaller and occupying much less space would have been adequate for the defendant's purpose, and also that the poles, as constructed, are dangerous to life and property in case of fire. If there is any evidence, however slight, tending to prove the plaintiffs' cause of action, the rule is that it is not within the power of the court to dismiss the complaint, or order a nonsuit. Nor can the court grant a nonsuit on the assumption that the plaintiffs' witness is not

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to be believed. Furthermore, in determining the propriety of a nonsuit, the court is legally bound to assume the truth of the facts which the testimony of the plaintiffs legitimately conduces to prove, although their correctness may be controverted by the defendants' witness.

Indeed, it has been held by the court of appeals, in the case of *Colt agt. Sixth Avenue Railroad Company* (49 N. Y., 671), "that it is not enough to justify a nonsuit that a court, upon a case made, might, in the exercise of its discretion, grant a new trial. It is only where there is no evidence in law which, if believed, will sustain a verdict that the court is called upon to nonsuit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial." I do not see, on the evidence as it stands, how, under these decisions, I can consistently nonsuit the plaintiffs on the ground that there is no evidence tending to show that the structures erected by the defendants incommode the public use of the street, or that, as constructed, they are unnecessary fixtures for the proper and reasonable transaction of the defendants' business. In arriving at this conclusion, I wish, however, to be distinctly understood as not intimating any opinion as to the weight to be given to such evidence by the jury. The evidence is in the case, and I cannot, without violating rules which it is well settled should control the conduct of a trial before a court and jury, refuse to submit the evidence to the jury.

Something was said in the argument about no damages having been shown to have been sustained in this case by the plaintiffs. The observations which I have made in regard to the points already discussed render a lengthy examination of that objection to the cause of action unnecessary. I will dispose of it, therefore, with the remark that, if the plaintiffs should succeed in establishing to the satisfaction of the jury that the poles in question do incommode the public use of the street in an unnecessary and unreasonable manner, not war-

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ranted by the statutes, the plaintiffs will be entitled, at least, to recover nominal damages, and that a nonsuit is properly denied if the evidence shows that the plaintiffs are entitled to recover even nominal damages (*See Van Rensselaer agt. Jewitt, 2 Com., 135*).

For these reasons the motion to dismiss the complaint, on all the grounds stated by the defendants' counsel, will be denied, and the proper exceptions will be allowed.

SUPREME COURT.

HUBBARD FOSTER, HUBBARD A. FOSTER, JEWETT M. RICHMOND and STEPHEN V. RYAN, agt. THE CITY OF BUFFALO.

Street or parks in cities — Rights of owners of lands abutting thereon — Easement.

The rule is, that where a conveyance is bounded upon a street or highway in the absence of any expression, showing a contrary intent, the grantor will be deemed to have intended to convey the fee to the center line of the street or highway. If, however, it is bounded by the easterly or westerly or the exterior bounds, or commences and runs from some fixed monuments so as necessarily to cause the line to run on the exterior line of the street or highway, so that it is apparent that it was the intention of the grantor to reserve to himself the fee of the highway, there the deed must be construed accordingly. It is a question of intent to be determined from the reading of the instrument.

Another rule is, that where the owner of land in a city lays out a street through, or a park in it, and then sells off lots on either side, bounded thereon, the purchasers are entitled to have the space of ground laid out left open forever for their use and enjoyment.

Where, as in this case, the Holland Land Company (who formerly was the owner of most of the land now embraced in the city of Buffalo); in the year 1814 laid out this open space and named it Cazenovia terrace, and it ever since has been kept open and used as a public street and park, the plaintiffs and their grantors in making their purchases understood that the same was so laid out and dedicated for that purpose:

Held, that even if it be conceded that the plaintiffs who are the present owners of some portion of the land abutting on said terrace, are not the owners of the fee of the lands embraced within the terrace, they

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are the owners of an easement therein, of which they cannot be deprived except by a voluntary conveyance, or by the taking of the same under the rights of eminent domain.

The city is not the owner of the fee of the lands embraced within the terrace and on which it proposes to erect the building; and until it acquires the fee, or extinguishes the easement, it has no right to take and occupy the same for any other purpose than that for which the lands were originally dedicated.

Erie, Special Term, August, 1882.

MOTION to continue the temporary injunction granted herein *pendente lite*.

E. J. Plumley, for plaintiffs.

Giles E. Stilwell, for defendant.

HAIGHT, J.—The defendants, the City of Buffalo and the police board of such city, threatened, and were about to take possession of a portion of Cazenovia terrace in the city of Buffalo, for the purpose of erecting thereon a building to be used by the police department of the city, for their offices, station-house, &c. The plaintiffs claim to own an interest in the land so proposed to be taken by the city, and they object to the taking of such land without being compensated for their interest therein.

Formerly the Holland Land Company was the owner of most of the lands now embraced in the city of Buffalo. In the year 1814 the company caused a map to be made and filed, whereby a portion of the lands embraced in the city was then divided into lots with streets and open squares designated thereon, among which was Cazenovia terrace. Subsequently, and in the year 1826, the trustees of the then village of Buffalo declared the terrace so laid out to be a public highway, and in the year 1832 it was ordered to be graded. During all the intervening time up to the present date the terrace has been used as a public street, with the exception of a small portion thereof between Seneca and Erie streets, and

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in the centre of the terrace, upon which trees were planted, and the same used as a public park. The legislature, by chapter 180 of the Laws of 1882, authorized the city to erect upon any portion of Cazenovia terrace which has been laid out and inclosed as public grounds, the building spoken of. It is not contended, however, that by this act the legislature has or can deprive private citizens of any interest that they may have in the lands. Such deprivation is prohibited by the Constitution. After the mapping and laying out of Cazenovia terrace, the Holland Land Company conveyed the lands abutting thereon bounding the same, in some instances upon the exterior line of the terrace, and in some instances upon the terrace. The plaintiffs are the present owners of some portions of the land so conveyed.

It is contended on the part of the plaintiffs that they are the owners of the fee of the land to the center of the terrace. The descriptions in their deeds where they adjoin the terrace differ in phraseology. I have not thought it necessary upon this motion to trace through the title of each and determine whether they are the owners of the fee or not. The rule is that where a conveyance is bounded upon a street or highway in the absence of any expression, showing a contrary intent, the grantor will be deemed to have intended to convey the fee to the center line of the street or highway. If, however, it is bounded by the easterly or westerly or the exterior bounds, or commences and runs from some fixed monument, so as necessarily to cause the line to run on the exterior line of the street or highway, so that it is apparent that it was the intention of the grantor to reserve to himself the fee of the highway, then the deed must be construed accordingly. It is a question of intent to be determined from the reading of the instrument.

If it be conceded that the plaintiffs are not the owners of the fee of any portion of the lands embraced within the terrace, still I am of the opinion that they are the owners of an easement therein, of which they cannot be deprived except

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by a voluntary conveyance, or by the taking of the same under the right of eminent domain. The rule is that where the owner of land in a city lays out a street through, or a park in it, and then sells off lots on either side, bounded thereon, the purchasers are entitled to have the space of ground laid out left open forever for their use and enjoyment. In this case the Holland Land Company laid out this open space, named it, and it ever since has been kept open and used as a public street and park. The plaintiffs and their grantors in making their purchases understood that the same was so laid out and dedicated for that purpose. By their purchase they acquired an easement in such open space.

It is not contended that the city is the owner of the fee of the lands on which it proposes to erect the building, and until it acquires the fee, or extinguishes the easements, it has no right to take and occupy the same for any other purpose than that for which the lands were originally dedicated.

In the case of the *White's Bank of Buffalo agt. Nichols*, in the court of appeals (*reported in 64 N. Y., page 65*), ALLEN, J., says: "Where the owner of land in a city lays out a street through it, and sells lots on each side of the street, * * * the grantees of lots are entitled as purchasers to have the interval or space of ground left open forever as a street, and to the right of using the way for every purpose that may be useful and necessary for the accommodation of the granted premises. Neither the corporation of the city, nor the state authorities, nor the grantor, can do any act to impair this right or restrict the grantees in the enjoyment of it. The lot owners having the right to this easement may exclude the owner of the soil himself. When land is granted, bounded on a street or highway, there is an implied covenant that there is such a way, that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns, shall have the benefit of it." This rule is old and familiar to the bar. It has been repeatedly sanctioned by our courts. The same rule was declared *In the Matter of the*

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Opening of the Eleventh avenue (reported in 81 N. Y., 436-444). The judge in writing the opinion in that case, after stating the rule and referring to the case of *The White's Bank of Buffalo* agt. *Nichols* (*supra*), says: "This general principle is too well established by authority to admit of dispute."

The case of *Pratt* agt. *The Buffalo City Railway Company, and others* (reported in 19 Hun, 30) is a decision of the general term of this department, and has reference to this Cazenovia terrace. In that case it was held that the plaintiff had an easement in the terrace, and that such easement would be impaired by the construction and operation of a steam railroad, and on that ground the defendant was enjoined.

About the year 1835 the city of Buffalo erected a market building upon this same terrace. Subsequently the city was indicted for erecting and maintaining such building in the terrace, on the ground that it was a nuisance. It was then held and decided that the terrace was a public highway; that the city had no right to build upon or block it up; that by so doing it was guilty of maintaining a nuisance. The city was convicted, and such conviction was affirmed in the general term.

My attention has been called to the case of *Gates* agt. *The Buffalo and East-side Railway Company*, in the city of Buffalo. The opinion was by DANIELS, J., and not reported. I do not understand that decision to be in conflict with any principle hereinbefore stated. In that case the Buffalo and East-side Railway Company desired to build and construct a street railway through Allen street. The plaintiff had procured an injunction. She was the owner of the land fronting upon the street. Her land, however, was bounded by the exterior line of the street, so that she did not own the fee. That she had an easement in the street, had the right to have it kept open, to pass over, along and upon the street, was not disputed. Whilst it has been repeatedly held that the laying of a street railroad track is an additional burthen upon the fee,

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it has not as yet been held to be an additional burthen upon an easement. The passage of a street car along the street does not encumber it any more than would the passage of an omnibus or a stage-coach. The owner of the easement still has the street kept open, still has the right to travel over and upon the same. A very different question would have been presented in case the railroad company had proposed to erect a permanent building in the street. In that case she would have been entirely deprived of her easement, which by the running of street cars remains unimpaired.

Upon the argument it was contended on the part of the city that the value of the interests of the plaintiffs in the premises was nominal and of trivial consequence, and that the city ought not to be delayed in taking possession of the premises. I do not understand that the courts have any discretion in the matter. The rule of law is the same whether their interests are worth six cents or \$600. Until they have received the value thereof and their interest is extinguished, the city has no right to take possession of their property.

The injunction should be continued until the city acquires the title to the premises.

NOTE. — This case has been affirmed in the general term on the foregoing opinion.

N. Y. COMMON PLEAS.

HENRY COULTER agt. ISRAEL BOWER *et al.*

Practice in foreclosure cases — Complaint — What should be alleged in — Allegation of default in performance of condition of bond necessary.

In an action for the foreclosure of a mortgage, where the complaint alleges the giving of a bond, there must be an allegation of default in the performance of the condition of the bond.

Special Term, October, 1882.

Coulter agt. Bower *et al.*

George W. Stevens, for plaintiff.

Edward M. Shephard, for defendant.

VAN BRUNT, *J.*—The complaint in this action is for the foreclosure of a mortgage, and alleges the giving of a bond conditioned for the payment of \$5,450 on the 1st day of May, 1861, with interest thereon at the rate of seven per cent per annum, and, as collateral security for the payment of such indebtedness, the execution and delivery to the plaintiff of a mortgage upon certain premises in the complaint described, and that the said mortgage contained the same condition as the said bond, and in default of payment of the said sum of money or the interest that might accrue thereon or any part thereof, the plaintiff was thereby empowered to sell, &c.; that the mortgage was recorded, and that there is now justly due to the plaintiff upon said bond and mortgage the sum of \$5,450, together with interest thereon from the 1st day of May, 1861.

The defendant in this action has demurred to said complaint upon the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action.

The defect complained of is that there is no allegation of default in the performance of the condition of the bond.

It is urged upon the part of the plaintiff in support of the complaint that if the facts set forth are sufficient for the statement of an indebtedness, the cause of action is complete, and that upon the trial, in order that the plaintiff should make out a case in the first instance no other proof would be required than the bond and mortgage themselves, and the evidence of their execution; that the plaintiff is not required to allege any more in his complaint than he will be obliged to prove in order to make out a *prima facie* case upon the trial.

This proposition is undoubtedly true, but the fact that without any denial of the execution of the bond and mortgage it would be necessary for the plaintiff to produce the bond and mortgage upon the trial goes to show that the proper allega-

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tions are not contained in the complaint. The fact of the possession of the bond and mortgage by the plaintiff has been held to be evidence and proof that there has been a default in the condition of the bond, if the bond upon its face is overdue, and the failure to produce the bond upon the trial in the absence of any evidence going to excuse its non-production, has been held to entitle the defendant to judgment because of the failure upon the part of the plaintiff to prove that there has been a default in the performance of the condition of the bond.

It might be very true that if a suit was brought upon the bond alone that an allegation of default would be unnecessary to entitle a party to a recovery where the bond had become due by its terms; but in an action to foreclose a mortgage, the suit is not upon the bond, but to enforce a collateral, and the collateral can only be enforced in case of the failure to perform the condition of the bond; and the rule governing pleadings in regard to contracts is, that if the contract is alleged to be broken, the breach must be averred. This is elementary law, and the contract or mortgage between the mortgagor and the mortgagee is only broken in default of the performance of the condition of the bond, and that breach must be alleged in order that the mortgagee may enforce the security which has been given to him to be enforced only upon breach of its condition.

I am of the opinion, therefore, that the demurrer is well taken, and that the complaint is fatally defective in not alleging the breach in the condition of the bond.

The plaintiff, however, may have leave to amend, upon payment of the costs of the demurrer.

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SUPREME COURT.

In the Matter of HARRY MCGARVEY.

Habitual drunkard — Debt contracted after inquisition found, but previous to the filing of same — When recoverable — Testimony that part of debt was for drinks without further proof that they were either strong or spirituous liquors or wines will not defeat recovery.

An inquisition finding a person an habitual drunkard was signed December 18, 1879, but not filed in the county clerk's office until December 7, 1880, when a committee was appointed. Between those dates, the drunkard, who seemed to have capacity for business and attended to some of his affairs, contracted a debt with one who had no knowledge of the pendency of the proceedings:

Held, that the debt was recoverable.

Testimony that a party who was not a lodger in an inn, tavern or hotel, had drinks, without further proof that they were either strong or spirituous liquors or wines, will not defeat a claim for said drinks under the provisions of the Revised Statutes (2 R. S. [6th ed.], 937, § 16).

Albany Special Term, May, 1882.

WESTBROOK, J., presiding.

MOTION to confirm report of a referee. The petitioner, who was a creditor of McGarvey, applied for an order to compel his committee to pay the debt. A reference was ordered to pass on the account and to report to the court. It appeared that proceedings had been taken under the statute against McGarvey, which resulted in an inquisition declaring him an habitual drunkard, dated and found December 18, 1879, but not filed until December 7, 1880. Between those days the indebtedness was contracted. The petitioner had no knowledge of the proceedings against the drunkard. Other facts are stated in the referee's report.

Edward J. Meegan, for petitioner.

I. The proper practice for a party who has a claim against a lunatic or habitual drunkard after office found, is to apply

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to the supreme court, by petition, for the payment of the debt, or for leave to bring suit for its recovery (*Soverhill* agt. *Dickson*, 5 *How. Pr.*, 109; *Brasher* agt. *Van Cortland*, 2 *Johns. Ch.*, 242; *Matter of Heller*, 3 *Paige Ch.*, 199; *Matter of Hopper*, 4 *id.*, 489; *Beach* agt. *Bradley*, 8 *id.*, 146).

II. The inquisition remaining unfiled for nearly a year, presents no bar to our claim, if the drunkard had capacity for business during the time our claim was accruing. (a) But for the effect claimed for this inquisition, our right to recover would be clear (*Mut. L. Ins. Co.* agt. *Hunt*, 9 *Weekly Dig.*, 365). (b) In the Revised Statutes (3 *R. S.*, [6th ed.], 53, 54), under which *Wadsworth* agt. *Sharpsteen* (8 *N. Y.*, 388) was decided, there was no requirement that the inquisition be filed, still the impression existed that it was the decree on the inquisition that gave the notice to the world, for, says *Johnson, J.*, in 12 *Barbour*, 238: "How can a person who is judicially declared a lunatic and in charge of a committee, make a contract." Again: "The inquisition found and the decree thereon is notice to all the world." As to the effect of an inquisition, see *Hart* agt. *Deamer* (6 *Wend.*, 497); *Den* agt. *Clark* (5 *Hals.*, 217; *S. C.*, 18 *Am. Dec.*, 417, and note). (c) Section 2332 of the Code of Civil Procedure, however, provides "the inquisition must be signed. * * The commission and inquisition must be returned by the commissioners and filed with the clerk." The word "must" in this section should be held to be peremptory, as the interests of third persons are concerned (*Blackwell on Tax Titles* [4th ed.], 706, *Rule 78*). (d) In cases where actions or proceedings are held to operate as *lis pendens*, the rule is that they must be prosecuted continuously and with diligence, else those dealing with the subject are not bound (14 *Am. Dec.*, 777, note). If the committee is practically abandoned or the committee resign, the lunatic may make contracts (15 *Am. Dec.*, 368). There is certainly a strong case of laches and abandonment in the case at bar. (e) A person who had been adjudged insane, but over whom no conservator had been appointed, and who continued in the

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management of his business, with nothing in his appearance to indicate his mental unsoundness, purchased goods necessary and useful in his business, at a reasonable price, and executed his note therefor. The seller had no knowledge or notice of his being adjudged or of his being a lunatic. *Held*, that the purchaser was liable on the note, and that payment of a judgment recovered therefor would not be enjoined (*McCormick* agt *Little*, 85 *Ill.*, 62; *S. C.*, 28 *Am. Rep.*, 610).

III. Some of the claim is for necessities, and that part should be ordered paid for, without reference to the committee, by one not having notice of committee (*Estate of Wing*, 2 *Hun*, 671).

William P. Rudd, for committee.

BUCHANAN, CHARLES J., *Referee*. — It having been referred to me to pass upon and adjust the several accounts and demands of Robert Harrison, the petitioner herein, and to determine the amount justly due to him from George Dawson, as committee of the person and estate of Harry McGarvey, named in the petition of said Harrison, herein, I do hereby report herein as follows: "From September 11, 1880, to November 10, 1880, both dates inclusive, Robert Harrison and Edward Van Valkenburgh were partners engaged in the business of buying and selling fish, oysters, clams and edibles, and were conducting a saloon, restaurant and bar at No. 782 Broadway, in the city of Albany, under the firm name and style of Harrison & Van Valkenburgh. Between said September eleventh and November tenth, both inclusive, said Harrison and Van Valkenburgh advanced and loaned money to said Harry McGarvey at his request, and on like request during said period sold and delivered to him at the city of Albany, certain goods, wares and merchandise, consisting of cigars, tobacco, meat, cheese, drinks, vegetables, oysters, clams, tongues, fish, bread, lobsters and pigs feet, amounting in all on November 10, 1880, to \$151.10; no part of which has

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been paid, though demand for payment thereof was, before the 23d of September, 1881, made upon both said McGarvey and said Dawson as such committee, and payment was refused. Of said sum of \$151.10, sixteen dollars and ten cents were for drinks. There is no evidence before me that said drinks, or any of them were either strong or spirituous liquors or wines, or that said drinks or any of them were alcoholic or intoxicating wines or liquors (2 *R. S.* [64th *ed.*], p. 937, *sec.* 16). On December 7, 1880, an order was granted by this court, at a special term thereof, whereby said George Dawson was appointed the committee of the person and estate of the said Henry McGarvey upon his (said Dawson's) filing with the clerk of said court a bond, with two sufficient sureties, to be approved of by a justice of said court, in the penalty of \$18,000, and conditioned for the faithful performance of his trust as such committee according to the statute and the rules and practice of the court, said order and the inquisition taken December 18, 1879, attached thereto relative to declaring Harry McGarvey to be an habitual drunkard, were filed in the clerk's office of Albany county, on the 7th day of December, 1880, and not till then. There is no evidence before me that said bond was ever filed as required by said order or otherwise; nor that the commission referred to in said inquisition was ever filed with the clerk or otherwise. Said Van Valkenburgh died July, 1881.

"To the close of November, 1880, said McGarvey had and kept his bonds and mortgages himself. Towards the latter part of September, 1880, said Harrison assisted said McGarvey to make out vouchers for his (said McGarvey's) stock. During the period that the said goods were sold and delivered to said McGarvey as aforesaid, he was in a condition to know what he was about, and to take care of himself.

"As conclusions from the foregoing facts, I find and determine that there is justly due and owing to said Robert Harrison, as surviving partner of the firm of Harrison & Van Valkenburgh, from said George Dawson, as committee of the

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estate and person of said Harry McGarvey the sum of \$151.10, with interest thereon from November 10, 1880."

The referee's report was confirmed, and an order was entered directing the committee to pay the sum found to be due, with referee's fees and costs.

SUPREME COURT.

THE PEOPLE agt. JOHN PETREA.

Constitutional law — Criminal law and practice — Construction of the amendments to the constitution adopted in 1874, with reference to local legislation — Practice as to drawing grand and petit jurors — Code of Civil Procedure, sections 1027, 1038, 1041, 1043, 1048, 1047 — Chapter 532, Laws of 1881, amending section 1041 of the Code of Civil Procedure, in so far as it provided for the selection of grand jurors, in and for the city and county of Albany held to be constitutional — Code of Criminal Procedure, sections 223, 238, 239, 258, 268, 278, 283, 312, 318, 321, 322, 332, 333, 338, 339, 359, 362, 363, 364, 365, 366, 375, 377, 455, 485, 517, 562 — Practice under these sections as to grand jurors — Indictments — Plea of prisoner — Appeals — Objection to panel of jurors, &c.

The defendant was indicted in September, 1881, for grand larceny, committed in the preceding month. When arraigned he interposed objections to the finding of the indictment in various forms, all however, centering in this, that the grand jury which found the indictment, was drawn from the names of persons selected by the recorder (a local judicial officer) of the city of Albany, and by the supervisors of the several towns (the recorder taking the place of the seventeen supervisors of the city), and from the petit jury list numbering some 2,500 persons, instead of from a list of three hundred persons selected exclusively by the supervisors of the city and county, as required by the Revised Statutes (3 R. S. [7th ed.], 2558, sec. 1), and which proceeding in that regard was taken under and pursuant to section 1041 of the Code of Civil Procedure, as amended by chapter 532 of the Laws of 1881, whereas, as was insisted, such amendment was unconstitutional in so far as it provided for the selection of grand jurors in and for the city and county of Albany, as it was a local act within article 3, section 18, of the constitution, which prohibits local laws for selecting, drawing, summoning or impanelling grand or petit jurors. The objections were overruled. A plea of not guilty was entered. On

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the trial, objection was taken to the petit jury on the same grounds which were also overruled. Conviction and sentence followed.

Held, that the conviction should be affirmed (LEARNED and BOCKES, JJ., concurring; WESTBROOK, J., dissenting).

The Code of Civil Procedure which governs the case provides no way by which such a question can be raised (*Per* LEARNED and BOCKES, JJ.).

A motion to quash, or to set aside an indictment should be made upon affidavits, and the Code prescribes no method of reviewing a decision thereon (LEARNED, P. J.).

There is no constitutional provision which allows a party always to appeal to the highest court, even when his grievance is that a constitutional right has been infringed (LEARNED, P. J.).

The legislature may refuse to give any right of challenge for any fault or error in the preparation of the jury list, provided only that the clerk properly drew the trial jury from the box of ballots prepared by him (LEARNED, P. J.).

There being no way of ascertaining whether chapter 522, of the Laws of 1881, was reported by Code commissioners, except by evidence *aliunde* the chapter in question of the acts of the legislature, said chapter cannot be held to be an infraction of the fundamental law, as the constitutionality of laws cannot be permitted to depend on possibly varying decisions of courts and juries on mere questions of fact as to which the legislature had special knowledge (LEARNED, P. J.).

The objections to the indictment were in the nature of a challenge to the array. They went to the entire panel. The mode of presenting the questions is however immaterial (BOCKES, J.).

The Revised Statutes limited challenges to grand jurors to an objection against the prosecutor or complainant serving on the jury, on the theory that the substantial rights of the prisoner would be protected on the trial before the petit jury (BOCKES, J.).

Irregularities in the selection or drawing of grand jurors, not affecting the substantial rights of the accused as regards the question of his guilt or innocence, is not a good ground of challenge to the array (BOCKES, J.).

The recorder, although acting under an unconstitutional law in selecting the list from which the grand and petit jurors were drawn, was, as to the act of selection, a *de facto* officer, and his selection cannot be questioned collaterally; and this rule is not changed because there was no dispute as to the title to his office, the objection being to the exercise of additional duties created by a law fundamentally bad. His action had the sanction of an apparent law duly certified to him and to the people of the state (BOCKES, J.).

The paper presented by the defendant was not a plea "to an indictment," and as such controlled by section 332 of the Code of Criminal Procedure. Neither was it a challenge to the array of grand jurors,

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nor to an individual grand juror, and therefore controlled either as to form or substance. The objection he made was radical; it was aimed at the jurisdiction of the court to place him on trial, and denied that he was indicted, as no grand jury had presented the accusation upon which he was arraigned (WESTBROOK, J.).

The Code of Criminal Procedure cannot be construed as intending to deprive a person of a constitutional right, and if it be capable of any such construction, which it clearly is not, such a barrier would be futile, for it is a legal impossibility by a statute to deprive a party of his right to claim constitutional protection. Under color of legislative enactment, a grand jury cannot be organized in a mode forbidden by the constitution, and prevent, under like color of legislation, the aggrieved party from being heard in assertion of his rights (WESTBROOK, J.).

By section 18 of article 3 of the Constitution, it is declared, "The legislature shall not pass a private or local bill in any of the following cases, * * * selecting, drawing, summoning or impanelling grand or petit jurors," and by section 25 of same article, it is provided "that sections 17 and 18 of this article shall not apply to any bill or the amendment to any bill which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes." These provisions are clear. Chapter 532, of 1881, is not an amendment to a *bill*, but is an amendment of a *law* in full force at the time of the passage of the former, and not having been reported by commissioners, is void (WESTBROOK, J.).

It is elementary that a body of men, no matter of whom composed, has, either of its own volition or upon the summoning and call of other than the authority of law, no power to resolve itself into a grand jury, and when professing to be thus organized, to accuse any one, by what it may call an indictment, of an infamous crime and subject him to a trial therefor (WESTBROOK, J.).

It is clearly the prerogative of the court to ascertain and decide whether, in the passage of any bill, a constitutional provision was violated (WESTBROOK, J.).

The authorities have settled these principles: First. That mere irregularities by an officer in doing that which he is authorized to do will not vitiate the thing done. Second. When duties properly and legally belonging to the office of which an individual is in possession have been performed by such incumbent, that which has been thus done will be upheld as to the parties affected thereby, and courts will not, in collateral proceedings, inquire into the right of the individual to hold the office and to discharge the duties which lawfully appertain to such office (WESTBROOK, J.).

But no such principles are involved in this case. The recorder assumed

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to do an act not properly appertaining to his office, as the constitution forbade conferring upon him such power by a local law (*WESTBROOK, J.*).

Priery agt. People (2 *Keyes*, 424); *Carpenter agt. People* (64 *N. Y.*, 483); *Dolan agt. People* (*Id.*, 485); *Cox agt. People* (80 *id.*, 500) examined and explained (*WESTBROOK, J.*).

The ruling of the court below involved one of the most sacred rights of a man — his right to be tried for a crime only after indictment by a grand jury organized according to law. When this prerequisite to a trial and conviction was not obtained, and a human being is in prison, without this safeguard of his rights having been observed, the court should rather stretch than curtail its power to review (*WESTBROOK, J.*).

Third Department, General Term, November, 1882.

APPEAL from a judgment of conviction for grand larceny, rendered in the court of sessions of Albany county. At the September (1881) term of said court of sessions, an indictment was found against the defendant for grand larceny, alleged to have been committed in the city of Cohoes, August 2, 1881. At the March (1882) term of said court of sessions, the defendant was brought into court, when he presented the following:

And the said John Petrea comes in his own proper person, and having heard the said indictment read, says that the state ought not further prosecute the said indictment against him the said John Petrea, because he says that (names of jurors), all of the grand jurors by whom the said indictment was found and returned into the said court at the said March term thereof, were not, all of them, the above named grand jurors, nor any one of them, at the time they so acted, and at the time the said indictment was found and returned, duly and legally selected and qualified to act as such grand jurors, in this, they, the said grand jurors, nor any one of them, had not then and there been drawn from a list of the names of three hundred persons prepared by the supervisors of the county of Albany, as is required by and provided for in and by the Revised Statutes of this state, or from any list of the names of any other or different number of persons what-

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ever, prepared by the said supervisors of said county of Albany to serve as grand jurors, but that, on the contrary thereof, the said grand jurors herein before particularly named, and each and every one of them, who found and returned the said indictment, were drawn by the officers named by law from the box containing the names of petit jurors selected for said county of Albany, under and pursuant to the provisions of chapter 532 of the Laws of 1881, entitled "An act to amend section one thousand and forty-one of the Code of Civil Procedure," under the pretense and claim that said chapter 532 was a valid and constitutional enactment and law, and that it superseded and repealed the provisions of the Revised Statutes regulating the subject; whereas it is averred and insisted by the defendant that the provisions of the said chapter 532, in so far as they relate to the city of Albany and the county of Albany, are obnoxious to and in contravention of the requirements of the constitution of the state of New York, which forbids the passage by the legislature of a private or local bill for selecting, drawing, summoning or impaneling grand jurors, and that the said chapter 532 was not reported to the legislature by any commissioner or commissioners who had been appointed pursuant to law to revise the statutes; by reason of the premises the said defendant has been deprived of the benefit and advantage of the superior care and discrimination required and theretofore used in selecting grand jurors, owing to the limited number of persons permitted by the wisdom of the legislature to be selected, and from which persons shall have been drawn to act as grand jurors in the consideration of his case; and that the result of said unconstitutional law compels the selection of grand jurors, and the grand jurors who found said indictment were selected from an ill-assorted, indifferently collected list of names, many being incompetent, exceeding in number 2,500, and being the petit jurors' list, and none of said grand jurors so drawn and hereinbefore specifically named were the same, but were wholly and entirely different

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persons from the persons who should have been drawn pursuant to the provisions of the Revised Statutes aforesaid, whereby he has been deprived of his constitutional rights in the premises.

And this the said John Petrea is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

JOHN PETREA, *Defendant.*

N. P. HINMAN, and

E. J. MEEGAN, *of Counsel.*

Thereupon the district-attorney objected, upon the ground that the proceeding was unknown to the criminal law and criminal procedure as it now stood.

By the COURT. — For the purpose of raising this question, I will overrule the objection and permit the plea to be filed.

It was conceded that the grand jury returning said indictment was selected and drawn pursuant to chapter 532 of the Laws of 1881.

The people filed a replication to defendant's plea, as follows :

And hereupon, D. Cady Herrick, district-attorney of Albany county, who prosecutes for the said state in this behalf, says: That by reason of anything in the said plea of the said John Petrea above pleaded, the said state ought not to be precluded from prosecuting the said indictment against the said John Petrea, because he says it is admitted that the said grand jury was selected and drawn pursuant to chapter 532 of the Laws of 1881, as in said plea stated ; and as to the other allegations, matters and things in said plea stated, he denies the same, each and all ; and this he, the said district-attorney, prays may be inquired of by the country. And this the said district-attorney is ready to verify ; wherefore he prays judgment, and that the said John Petrea may be convicted of the premises in the said indictment above specified.

D. CADY HERRICK,

District-Attorney.

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The following rejoinder was filed :

And the said John Petrea, as to the said replication of the said district-attorney to the said plea by him, the said John Petrea, pleaded, says that the said state, by reason of anything by the said district-attorney in that replication alleged, ought not further to prosecute the said indictment against him, the said John Petrea, because he saith that all matters of facts in said plea stated are true, and constitute in law good and sufficient reasons for sustaining the same; and the said John Petrea joins issue upon the allegations of denial in said replication stated; and of this he, the said John Petrea, puts himself upon the country.

JOHN PETREA.

N. P. HINMAN,

E. J. MEEGAN,

Of Counsel.

The defendant's counsel asked the court to hold as matter of law that the constitution, having prohibited the legislature from passing a local bill for the purpose of selecting or drawing grand jurors with certain exceptions, the *onus* was upon the people to show that said chapter 532 came within the exception, which was refused and an exception taken.

The defendant then offered to prove by the clerk of the senate, by the commissioners appointed to revise the statutes, by the journal of the legislature of 1881, and by the original act itself, that the law in question was not reported to the legislature by any commissioner or commissioners who are or had been appointed pursuant to law to revise the statutes, which offer was objected to, and the objection sustained, and the defendant excepted.

The defendant offered to prove that said chapter 532 was introduced in the legislature by a member thereof who was not, and never had been, a commissioner to revise the statutes or any statute.

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The plea was thereupon, on motion of the people, overruled and an exception taken.

The same questions were raised on motions to set aside and to quash the indictment.

The defendant pleaded not guilty. Upon the trial of the indictment the same questions were raised as to the panel of petit jurors and to each juror, which were overruled. The defendant was convicted. A motion for new trial was made and denied. The defendant was also convicted of escape from jail, in which case the same questions were raised. The defendant appealed.

Nathan P. Hinman and Edward J. Meegan, for appellant.

I. The grand jury which found and presented the indictment herein, and the petit jury which tried the case were organized under and by virtue of chapter 532 of the Laws of 1891. The claim made by the defendant, as his plea and objections show, is that the act in question, so far as it affects the city and county of Albany, is in conflict with the constitution, as amended November 3, 1874. Article 3 of section 18 of the constitution provides: "The legislature shall not pass a private or local bill in any of the following cases: * * * Selecting, drawing, summoning or impanneling grand or petit jurors." This provision is qualified by section 25 of the same article, which provides: "Sections 17 and 18 of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes." 1. Reference to the statutes will show that there have been no such offices or officers as "commissioners who have been appointed pursuant to law to revise the statutes" subsequent to May 1, 1878, and, therefore, said chapter 532 could not have been reported as provided for in said section 25. The statutes relating to the subject are as follows: Chap. 88, Laws of 1870; chap. 467, Laws of 1873; also *Id.*, p. 1007; chap. 212, Laws of 1874; chap. 520, Laws of 1875; Laws of 1877, p. 141. Laws of 1876 (*1 S. L.*, pp. 176, 177) contained this provision: "The term of office of the said commissioners is hereby extended to the first day of May, in the year eighteen hundred and seventy-eight." 2. Prior to the passage of chapter 532, Laws of 1891, aforesaid, the Code of Civil Procedure nowhere made provision for the drawing, summoning or impanneling of grand jurors for Albany county; the Revised Statutes provided the method as follows: "Section 1. The supervisors of the several counties of this state, except the city and county of New York, at their annual meetings in each year, shall prepare a list of the names of three hundred persons to serve as grand jurors at

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the courts of oyer and terminer and courts of sessions to be held in their respective counties during the then ensuing year, and until new lists shall be returned" (3 R. S. [6th ed.], 1015; 3 R. S. [7th ed.], 2358). (The foregoing section is taken from article first, entitled "Of the return and summoning of grand juries, their powers and duties.") 3. Said chapter 532 is as follows:

CHAPTER 532.

AN ACT to amend section one thousand and forty-one of the Code of Civil Procedure.

"SECTION 1. Section one thousand and forty-one of the Code of Civil Procedure is hereby amended so as to read as follows:

SEC. 1041. Each ward of the city of Utica is considered a town for the purpose of this article; and the supervisor and assessor of that ward must execute the duties of the supervisor, town clerk and assessors of a town, as prescribed in the foregoing sections of this article, except that a duplicate of the list of jurors made by them must be filed in the office of the clerk of the city. In the city of Albany the recorder of said city shall perform the duties imposed by this title upon the supervisor, town clerk and assessors of towns. In Albany county, grand jurors shall hereafter be drawn from the box containing the names of petit jurors selected for said county in the same manner as petit jurors, and thereafter no separate list of grand jurors shall be prepared for said county. In each of the other cities of the state the like duties must be performed by the officers, and in the manner prescribed by law. A city, wherein two or more assessors are elected for the entire city, is considered a town for the purposes of this article, except where the officers who are to perform the duties of the supervisor, town clerk or assessor, as prescribed in this article, are specially designated by law."

4. The following gives the section as it was prior to the foregoing amendment:

RULE IN CITIES.

"SEC. 1041. Each ward of the city of Albany or Utica is considered a town for the purposes of this article; and the supervisor and assessor of that ward must execute the duties of the supervisor, town clerk and assessors of a town, as prescribed in the foregoing sections of this article; except that a duplicate of the list of jurors made by them must be filed in the office of the clerk of the city. In each of the other cities of the state, the like duties must be performed by the officers and in the manner prescribed by law. A city wherein two or more assessors are elected for the entire city, is considered a town for the purposes of this article, except where the officers who are to perform the duties of the supervisor, town clerk or assessor, as prescribed in this article, are specially designated by law."

(Article second, from which the foregoing is taken, relates to trial

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jurors alone.) The ten hundred and forty-first section, read in connection with the ten hundred and thirty-fifth section, gives the method of selecting petit jurors, anterior to alleged amendment of section 1041. "Section 1085. The supervisor, town clerk, and assessors of each town, must meet on the first Monday of July, in the year one thousand eight hundred and seventy-eight, and in each third year thereafter, at a place within the town, appointed by the supervisor; or in case of his absence or of a vacancy in his office, by the town clerk, for the purpose of making a list of persons to serve as trial jurors for the then ensuing three years. If they fail to meet on the day specified in this section, they must meet as soon thereafter as practicable." 5. The sweeping change proposed to be made may be thus seen at a glance; it attempts completely to revolutionize the existing system. It provides that the grand jurors in Albany county shall be drawn from the petit jurors' box, and the names of proposed petit jurors, so far as Albany city is concerned, are to be selected, not as theretofore by the seventeen supervisors, but by the recorder of the city of Albany. And this change is purely local, being limited to the city of Albany.

II. The amendments to the third article of the constitution, ratified in 1874, were the product of the constitutional commission appointed by Gov. Hoffman in 1872. The state had just emerged from a period of special and pernicious local legislation, and our people demanded restrictive measures. It was in obedience to the popular opposition to the vice of local laws solemnly enacted for every square mile of territory in the state, as special emergencies arose, that the article in question was formed. The committee of the commission who formulated said article, consisted of Messrs. E. Brooks, F. Kernan, H. V. Howland and C. L. Tracy. (As reported by them it did not contain the twenty-fifth section.) The reasons of the commission for its adoption, as stated by the committee, are to be found in journal of constitutional commission of 1872 and 1873, page 804. The journal of the commission also shows that the twenty-fifth section was afterwards added by the revision committee. (Page 455.) At that time Code commissioners were at work, resulting in the adoption, in 1876, of the first thirteen chapters of the Code of Civil Procedure, and the remaining nine chapters in 1880, and afterwards the Code of Criminal Procedure. The amendments aforementioned, recommended by the constitutional commission, were adopted by the legislature of 1873 (*Session Laws*, p. 1401) and of 1874 (*Session Laws*, p. 927), and ratified by the people in November, 1874. The value of the full report of the committee above given, stating their reasons at length why the article in question was proposed for adoption as part of the organic law of the state, is understood when the opinions of eminent jurists in expounding constitutional law are studied. WALWORTH, Ch., says: "One mode of construing this section is, to take the constitution as we find it, without reference to

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the manner in which its different parts were proposed and adopted; and another is, to look at the proceedings of the convention and endeavor thereby to discover the probable intention of the framers of the constitution as we now find it" (*Clark agt. The People*, 26 *Wend.*, 603). BRONSON, J., referring to the debates of a constitutional convention, said: "We have here the most unequivocal proof — evidence which no man can fail to see, wink as hard as he will — that the framers of the constitution meant precisely what they said" (*The People agt. Purdy*, 2 *Hill*, 37; *Cooley's Const. Lim.* [4th ed.], 80). Although the rule contended for by the defendants may occasion inconvenience, it will make no difference. "It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects" (BRONSON, J., *Oakley agt. Aspinwall*, 3 *N. Y.*, 568; *Story on Const.*, sec. 407; *The People agt. Morrell*, 21 *Wend.*, 563).

III. It is submitted that, so far as Albany is concerned, chapter 532 of the Laws of 1881 is a local bill, and therefore falls within the constitutional inhibition, as it attempts specially to provide for the selecting and drawing of grand and petit jurors for this particular locality (*The People agt. Hoffman*, 60 *How. Pr.*, 324; *affirmed*, 24 *Hun*, 142; *Wenzler agt. People*, 58 *N. Y.*, 525; *Kerrigan agt. Force*, 68 *N. Y.*, 383; *Sedg. on St. and Const. Law* [Pomeroy's Ed.], 529 n). (1.) If the title of chapter 432 run thus: "An act in relation to grand and petit jurors in the city and county of Albany," would a claim be made that it was not a local act within the intent and prohibition of the constitution? Does it alter the effect by mixing these local regulations in an amendment to a general act? Clearly not. It is a plain case of attempted evasion of the constitution, which the courts will not tolerate. The court of appeals formulates the rule as follows: "A thing, within the intent of a constitutional enactment, is, for all purposes, to be regarded as within the words and terms of the constitution, and a legislative enactment, evading the terms and frustrating the general and clearly-expressed or necessarily-implied purposes of the constitution is as clearly void as if in express terms forbidden" (*The People agt. Alvertson*, 55 *N. Y.*, 50; *Matter of N. Y. Elevated R. R. Co.*, 70 *N. Y.*, 349; *Taylor agt. Com'rs*, 23 *Ohio* [*N. S.*], 22; *Belleville R. R. Co. agt. Gregory*, 15 *Ill.*, 20; *People agt. Allen*, 43 *N. Y.*, 404; *State agt. Herman*, 15 *Cent. L. J.* [*Mo.*], 129; *see* 14 *Reporter*, 339). Because the act is in the form of an amendment to a general act or Code, the constitutional objection is not thereby obviated. "It is contended that the Traylor act is but an amendment to the Political Code; that the Political Code contains a general law upon the subject to which the Traylor acts relates and that by this sort of tacking the latter act is converted into a general law. We cannot appreciate the logic or force of the argument. The question is, had the legislature the constitutional

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power to pass the act under consideration? * * * If it is a special or local law, then it comes directly within the inhibition of the constitution and never had any validity, for the legislature had no power to enact it. We do not understand how any law can be amended by a void act" (*Earl agt. San Francisco Bd of Ed.*, 55 Cal., 492). If it is competent to regulate good jurors in Albany county in this way, what is there to prevent sixty-four other local laws, one for every other county in the state, dissimilar to each other, and producing by the variety of enactments, the same ignorance of this important subject as now prevails in reference to the law in general of our sister states. Grand jurors being county officers, to require a general law on the subject, necessarily implies one covering the state at large. In no other manner could the provision have effect.

IV. No commissioners "who have been appointed pursuant to law to revise the statutes," having reported to the legislature said chapter 532, it does not fall within the exception made by the fundamental law. 1. The language of the exception is plain. To hold that the legislature may amend at will a Code reported by commissioners, would compel a transposition of sentences of the section in question, and instead of, as it now reads, "shall not apply to any bill or the amendment to any bill which shall be reported," &c., it would run, "shall not apply to any bill which shall be reported, &c., or the amendments to any such bill." Such a construction would be a practical nullification of the restrictions in the constitution and open the door to special legislation, without limit and on any subject. 2. The district attorney, in the court below, conceding that section 1041 "was a local act," inquired, with apparent amazement, "is the amendment to that local act unconstitutional? Must all amendments to any local act or law contained in the Code be reported by commissioners appointed to revise the statutes?" We answer, in the language of the constitution, that "the legislature shall not pass a private or local bill for selecting grand or petit jurors, except or unless such bill shall have been reported by the commissioners," &c. Thus saith the fundamental law. Does it mean what it says? The prohibition is general. The legislature shall not pass a (any) private or local bill on that subject. A bill is strictly a draft of an act of the legislature before it becomes a law; a proposed or projected law (1 *Burrill's Law Dictionary*, 204). The word is frequently used in this sense in the constitution (*See secs. 13, 14, 15 and 16 of art. 3, and sec. 9 of art. 4*). It is expressly provided that "no law shall be enacted except by bill" (*Sec. 14, art. 3*). There are other instances, however, where the word is used as a synonym for act or law (*See sec. 12, art. 7*). And it is manifestly used in both of those senses in section 25 of article 3, as we shall have occasion to show hereafter. In section 18, however, of the same article, the words "bill" and, "law" are each used in their strict grammatical sense — the word "bill" in speaking of proposed laws,

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and the word "law" in referring to bills passed or adopted, or to be adopted by the legislature. "The legislature shall not pass a private or local bill in any of the following cases (specifying them), but the legislature shall pass general laws providing for these cases," &c. (Sec. 18). The prohibition, then, contained in section 18 is absolute and universal. It extends to any and all cases of proposed laws, private or local, for any of the purposes specified. All legislation, either to create a new law or to amend an old one, is interdicted, except by bill; and then follows the provision that no private or local "bill" shall be passed for selecting jurors, which is tantamount to saying that there shall be no legislation on that subject of a private or local character. The prohibition, therefore, necessarily includes proposed amendments to old laws as well as projected new laws. This result ought not to surprise the district attorney, because this precise answer has been given to the same question in analogous cases by the highest judicial authority. Section 16 of the same article of the constitution provides that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in the title." And it has been repeatedly held that this prohibition extends to amendments of private or local laws (*People agt. Hills*, 35 N. Y., 449; *People agt. O'Brien*, 88 N. Y., 198). The act in question then, as an amendment of a local law, clearly falls within the constitutional prohibition, unless it is saved by the exception created by section 25. But that section merely excepts from the general prohibition "any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed to revise the statutes." It is an undisputable fact that this act was not so reported, and hence does not come within the terms of this saving clause. Nor is it possible to construe the language of this exception so as to reach any other conclusion. Nothing is saved, if private or local, no matter what it may be called, a bill, an act, a law or an amendment to a bill, act or law, unless reported to the legislature by the commissioners. But as some stress may be laid upon the use of the words "amendment to any bill," in the exception, it may be well to pause a moment on this aspect of the question. It has been suggested that the insertion of these words in section 25, and their omission in section 18, justifies the inference that the prohibition in the latter section was not intended to include amendments to local laws. It is a sufficient answer to this criticism that section 25 was not limited in its operation as an exception to the prohibition contained in section 18. It was also intended to qualify the provisions of section 17 on another subject, and the language of the exception was therefore adapted to the provisions of both of the previous sections to which it is equally applied. But if this were otherwise, and section 25 were designed merely to limit the effect of section 18, it would not sustain the conclusion thus sought to be deduced. An exception cannot

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well be more comprehensive in meaning than the rule it is designed to qualify, and hence the insertion of this clause in the exception proves that it was deemed necessary in order to limit the operation or effect of the previous prohibition. Besides, the sovereign people who adopted these new constitutional provisions will be presumed to have been familiar with the prior provisions contained in section 16, and with the judicial construction which had been given to the phrase "private or local bill" in that section, as already stated. And it will also be presumed that the same words were afterwards used to convey the same meaning in section 18. Nor would it follow from this view that the legislature must adopt, *verbatim*, the bill or amendment as reported by the commissioners. A reasonable construction must be given to the language used to give effect, not to defeat, the intention of the framers of the constitution. The evident policy and object of the provision was, that private or local bills, including amendments to local laws, should originate with and be reported by a legal commissioner, and that such bills in all their essential features, should be ratified or rejected by the legislature. But while accepting the bill thus proposed in its general scope and purpose, the legislature would doubtless have the power to change the phraseology or to rearrange the details of the measure according to its own views of policy and propriety. Indeed, the only limit to the exercise of the legislative discretion, in this respect, would be that the bill thus modified in the course of its passage, must not be shorn of its distinguishing characteristics as originally reported by the commission. This view is strengthened by the provisions of section 17 of article 1 of the constitution, as originally adopted in 1846, and the practical construction given this language by the legislature and the courts down to the present time. "The legislature, at its first session after the adoption of this constitution, shall appoint three commissioners whose duty it shall be to reduce, into a written and systematic Code, the whole body of the law of this State, or so much and such parts thereof, as to the said commissioners shall seem practicable and expedient. And the said commissioners shall specify such alterations and amendments therein, as they shall deem proper, and they shall at all times make reports of their proceedings to the legislature," etc. (*Art 1, sec. 17*). Under those provisions the commissioners reported to the legislature, from time to time, political, civil and criminal codes of the whole body of the law, as well as of civil and criminal practice in the courts, none of which were ever adopted by the legislature, except the old Code of Procedure, which was subjected to many alterations and amendments in the course of its passage. Nor is it true that this peremptory prohibition, properly enforced, would render all existing local laws on the subject specified "fixed, unalterable, irrevocable." The design, doubtless, was to prevent further local legislation on these subjects, and to compel the adoption of general laws for

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the governance of cases not provided for by the local laws then in force. Whenever an existing local law needed amendment to make it effectual, the new policy of the constitution, as expressed in section 18, article 8, requires not the passage of a new local bill or amendment, but the repeal of the old law and the enactment of a general law providing for the emergency. But even if all the practical results suggested by the district attorney in the court below were the necessary outcome of this construction of the constitution, they could not properly affect or change the necessary conclusion. The language of the prohibitory clause is clear definite and peremptory. In such a case it is the imperative duty of the legislature to obey the constitutional mandate, and if the legislature fails in this respect, the courts must not hesitate to recognize and enforce the paramount law (*People agt. Albertson*, 55 N. Y. 50). Finally, if the legislature is hampered by these restrictions, the district attorney, in an argument on this subject, made before the Albanyoyer and terminer, entertained (and no doubt still has) distressing fears of the failure of parliamentary government. But he should remember that this, after all, is a republican, not a parliamentary government. The legislature with us, is not omnipotent, but subject to all the limitations imposed by the constitution. In the language of the commission which proposed these provisions as they are now incorporated in the fundamental law, "the experience of the legislature and the judgment of the people have for many years demonstrated the necessity of less local legislation, and the wisdom, whenever it is possible, of requiring general laws to take the place of special acts," and no better evidence can be given of the wisdom and justice of the construction of these provisions for which we contend, than the complaints of the district attorney concerning the practical results which must be anticipated. As these results are in harmony with the policy which led to the adoption of these provisions, they afford the most conclusive reason why they should be strictly and rigorously enforced. 8. The ten hundred and forty-first section of the Code, attempted to be amended by chapter 532 aforesaid, contained no reference to grand jurors prior thereto. It related to trial jurors only. If new matter so entirely incongruous to the original text can be thus injected, why will not the Code of Civil Procedure be the happy medium through which every scheme, venture, enterprise, speculation and obnoxious measure, forbidden by the constitution, be carried to a successful and triumphant legislative success and conclusion. Let us examine, for a moment, the extraordinary things in store for the people of the state, unless the defendant's theory is sustained. First. The Code might be amended so as to change the names of persons. Second. Or with reference to roads, or draining swamps, in particular localities. Third. Or locating or changing a county seat. Fourth. Or to incorporate a village. Fifth. Or to regulate the method of finding

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and drawing indictments, and the course of criminal procedure, including change of venue, in the city and county of Albany. Or any of the other acts forbidden by the section in question, and every one of these would be just as germane to the Code as the attempt to incorporate a part of the criminal procedure relating to grand jurors in the Code of Civil Procedure. A contrary construction will carry joy to the hearts of the legislative jobbers, who thereby will be able to ply their vocations in the above enumerated cases, and which we have good evidence were intended to be forbidden by the constitution. Why should there be different rules for each separate county; are we not a homogeneous people? Does Albany require different methods from those that answer the wants of the adjoining counties of Rensselaer, Saratoga, Schenectady or Schoharie? If the sensational comments of the district-attorney in the court below have any foundation, the county of Albany should be governed by some sultan or potentate appointed by some friendly and not so wicked a power as prevails in Albany county. Experience teaches that the elements which can elect every one of seventeen supervisors of the city, may readily capture a nomination and elect a recorder, and then, according to the district attorney, as expressed in the court below, the end comes. 4. The courts will not construe the constitution so as to thwart its evident intent and purpose (9 *Wheat.*, 81); or suffer it to be eluded (*People agt. Utica Ins. Co.*, 15 *Johns.*, 358). The phraseology of the section proves that the intention of the constitution was to close the doors; it devitalized and rendered nugatory the enacting prohibitory clauses only as the result and effect of the report of commissioners who had been appointed, thereby expressly rejecting the idea of future commissioners, presumptively from an assured confidence in the integrity and ability of the commissioners then serving. "In interpreting clauses we must presume the words have been employed in their natural and ordinary meaning. Says MARSHALL, Ch. J.: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant'" (*Cooley's Const. Lim.* [4th ed.], 72). "The objection of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the law giver that is to be enforced" (*Cooley's Const. Lim.*, 68). It was competent for the Code commissioners to report a bill or an amendment thereto, and in fact they have frequently done so. The word "which" must be understood to relate to that which precedes it, and to cover both propositions, the bill and the amendments to any bill. The office of a proviso, generally, is either to except something from the enacting clause, to restrain its generality or to exclude some possible ground of misinterpretation of it, as extending to cases not intended to be brought within its purview (*Minnie agt. U. S.*, 15 *Peters*, 423; *Wyman agt. Southard*, 10 *Wheat.*, 1, 80). A proviso in a statute is to be

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strictly construed ; it takes no case out of the enacting clause which is not fairly within the terms of the proviso (*U. S. agt. Dickson*, 15 *Peters*, 141 ; *Potter's Dwarris Stat.*, 118, n. 11). 5. The rules of interpretation and construction are the same with reference to written agreements, statutes or constitutions. These rules afford a safe guide in ascertaining the constitutional intent as to the section under discussion. Remembering the language of the section, it is submitted that *Coxson agt. Doland* (3 *Daly*, 66), decides the controverted proposition. It holds that "the grammatical rule, which is also the legal rule in construing statutes, is, that when general words occur at the end of a sentence they refer to and qualify the whole, while if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows." Judge Miller, in *Lambert agt. The People* (76 *N. Y.*, 225 *et seq.*), discusses the question as to the effect to general words at the end of an affidavit, and approves of the rule laid down in *Coxson agt. Doland* (see, also, *Van Noy agt. Furling*, 7 *N. Y. Weekly Digest*, 485 ; *The King agt. Inhabitants of Shifton*, 8 *Barn. & Cress.*, 94), where the principle is applied. In section 25, the general words are at the end of the sentence, and within these authorities must be held as relating to all that precedes it, and consequently the general words "which shall be reported," &c., include "any bill, or the amendments to any bill."

V. Independent of the statute terminating the term of office of the commissioners to revise the statutes, the fact is that chapter 583 in question was introduced without the agency or knowledge of anyone who ever had been appointed a commissioner to revise the statutes. Some rules of evidence on the subject are material. 1. The burden rests upon those who sustain this law to prove it to be constitutional. It must be shown that the constitutional prerequisites were complied with (*People agt. Commissioners*, 54 *N. Y.*, 276). 2. It is competent to use the journals of either house to impeach a law apparently invalid. They may be resorted to in ascertaining whether an act was passed by a two-thirds vote (*Purdy agt. The People*, 4 *Hill*, 884, per PAIGE and FRANKLIN, *Senators* ; *De Bor agt. The People*, 1 *Denio*, 14). *The People agt. Devlin* (83 *N. Y.*, 269), holds that it is not competent to show, after a bill has been passed by both houses and sent to the governor, that one of the houses passed a resolution recalling the bill; but POTTER, J., says (p. 270): "Whenever any act or proceeding of such a body becomes necessary to be shown as evidence, such journals may be received (*Berry agt. Baltimore Railroad Company*, 41 *Md.*, 446). "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow the requirements of the constitution, or that in any other respect the act

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was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void" (*Cooley's Const. Lim.* [4th ed.], 164, citing numerous cases; see, also, *Brady agt. West*, 60 *Miss.*, 68; *Bradley agt. West*, 60 *Mo.*, 88; *The Elevated Railroad Cases*, 8 *Abb. N. C.*, 872; *Town of Ottawa agt. Perkins*, 94 *U. S.*, 260; see 18 *Federal Rep.*, 288, 728).

VI. The organization of the grand jury which found this indictment cannot be upheld upon the theory that the act of the recorder in selecting the jurors from which the jury was drawn, was that of a *de facto* officer. The legal principle that the acts of a *de facto* officer cannot be questioned collaterally, has no application to the case. 1. The recorder was a *de facto* and a *de jure* officer. No one questioned his right to occupy that office, and there was and is no contest as to his title. In all the cases that the principle contended for by the people has been invoked there existed a dispute as to which one of two or more claimants was the *de jure* officer. Here an effort is made to transfer by statute a part of the duties of existing officials, county officers, the supervisors, to another existing official, a city officer, the recorder. We object to this transfer of official duties, not to Mr. Gould's title to the office of recorder. Our contention, therefore, is, that the recorder is assuming to act, in selecting grand jurors, under a law which, being unconstitutional, affords no cover or protection for such acts, and they are simply void. Like the case of *Kelly agt. Bemis* (4 *Gray*, 83), a justice of the peace issued a warrant for the arrest of a person under a law afterwards held to be unconstitutional. An action for false imprisonment against the justice was sustained, the court saying: "Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute" (*Barker agt. Stetson*, 7 *Gray*, 54; *Gross agt. Rice*, 71 *Me.*, 241). These and other authorities make apparent the distinction broad and clear between the claim for an office and a claim to discharge additional functions created by an unconstitutional law (*Thompson & Merriam on Juries*, sec. 138; *Robinson's Elem. Law*, sec. 359). It is submitted that the law is settled in our state, that where one acts as an officer under a commission issued without authority, or under an unconstitutional law, no one is bound and no one is protected under it (*People agt. Blake*, 49 *Barb.*, 9; *People agt. Albertson*, 8 *How. Pr.*, 363; *People agt. Carter*, 29 *Barb.*, 208; *Williams agt. Garrett*, 12 *How. Pr.*, 456; *Hamlin agt. Dingman*, 5 *Linn.*, 64; See *People agt. Kelsey*, 34 *Cal.*, 475). 2. Judge COOLEY says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection

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to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto*, is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force" (*Cooley's Const. Lim.*, 227). 8. *Carpenter agt. The People* (64 N. Y., 483) does not apply to the case at bar. There the prisoner claimed that one Douglas Taylor was the rightful commissioner of jurors of New York county, but that one Thomas Dunlap, claiming to act as such commissioner under an appointment from the mayor, actually selected the jury. Dunlap was, therefore, claiming title to an office, and his title thereto was disputed. The court says "he was, therefore, a *de facto* officer." But no one disputes the right of recorder Gould to his office. His title thereto is perfect. He assumes, however, as in the case of *Kelly agt. Bemis* (4 Gray, 83), to act under a law which is invalid, and to such unlawful action we object. In other words, the question is not whether he had a right to act as recorder, but whether any recorder had a right to so act.

VII. Plainly the act of the recorder in designating the names of the persons from whom grand and petit jurors are to be drawn is a selection within the constitutional provision. 1. Chapter 532 of the Laws of 1881, the one in question, declares the act of the recorder to be a selection, for the word "selected" is used. The grand jury are to be drawn from the box containing the names of petit jurors selected for the county. And who selects for the city of Albany? The recorder. 2. The constitution follows the order prescribed in and by the Revised Statutes and the logical arrangement of the text-books: First, "selecting;" second, "drawing;" third, "summoning;" fourth, "impaneling" (*Article 3, section 18*). The first step is provided for in the Revised Statutes in this wise: "In preparing such lists" (of grand jurors) "the said board of supervisors shall select such persons only as they know, or have good reason to believe, are possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and are of approved integrity, fair character, sound judgment and well informed (3 R. S. [7th ed.], 2558, sec. 8). Section 10 (*Id.*) provides for the drawing by the county clerk in presence, etc. Section 12 (*Id.*) provides for summoning, etc. Chapters 4 and 5 of *Proffatt on Jury Trials* (secs. 114, 145) arranges the methods in the same manner as the constitution—"selected," "drawing," "summoning," "impaneling." He says: "But according to the system in some of the states, as, for instance, in the state of New York, they" (the grand jurors) "are selected from the body of the county by the board of supervisors, and separate ballots containing their names are placed in a box kept by the clerk of the county, from which the requisite number are drawn by lot to form the jury" (*Sec. 47*). These words of the consti

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tution, prior to the adoption thereof, as will be thus seen, had a definite and fixed meaning in law, and the courts will give the same meaning and effect to the words of a constitution as they were understood prior thereto (*Cooley on Const. Lim.* [4th ed.], 64). The recorder is required to perform the duties of supervisor, town clerk and assessors. What were their duties? The Code of Civil Procedure, defining them (*sec.* 1086), provides: "At the meetings specified in the last section, the officers present must select from the last assessment-roll of the towns, and make a list of the names of all persons whom they believe to be qualified to serve as trial jurors, as prescribed in the last article." The subsequent sections provide for the drawing, summoning, &c., the jurors.

VIII. Our claim is that the grand jury should have been selected under and pursuant to the Revised Statutes, the Code provision being void; the Revised Statutes were not repealed (*The People agt. Tiphaine*, 3 *Park. Cr. R.*, 241; *State agt. Clear*, 11 *Nev.*, 89; *State agt. Johnson*, 11 *Nev.*, 148). 1. "Compliance with the forms and mode pointed out by statute for summoning a grand jury is necessary; any omission or violation of the mode will be sufficient to justify the quashing of the indictment" (*Proffatt on Jury Trial*, *sec.* 46; *McQuillen agt. State*, 8 *Smed. & M.*, 587, 597; *Stokes agt. State*, 24 *Miss.*, 621; *Wash. on Cr. L.*, 121; *Com. Dig.*, *indict. A.*; *Moore C. L.*, *sec.* 774; *Iowa agt. Brandt*, 9 *Weekly Jurist*; *State agt. Lightbody*, 38 *Maine*, 200; *Reich agt. State*, 1 *Hawley's Am. Crim. Rep.*; *see* 26 *Alb. Law Journal*, 516).

IX. The defendant has the right to raise the question of invalidity of the law, and he has taken every step essential to be entitled to a hearing thereon. 1. He filed a plea in abatement and moved to quash, and also set aside the indictments. Objection was duly taken to the petit jury. 2. The ancient statute, 11 Henry IV, chapter 9 (and which, so far as applicable, became part of our common law, 1 *Kent Com.*, 473), secured the right to object to an indictment in these words: "That from henceforth no indictment be made by any such persons but by inquest of the king's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs of franchises before made by any person of the names which by him should be impanneled, except it be by the officers of said sheriffs or bailiffs of franchises, sworn and known to make the same, and other officers to whom it pertaineth to make the same, according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and forever holden for none" (2 *Hals P. C.*, 155; 16 *Am. Law Review*, 219). The statute prescribed no formula, and the courts have recognized various ways of reaching and remedying any objections to the grand inquest. 3. The ordinary method of objecting to a grand jury is by plea in abatement (1 *Bish. Crim. Pro.*, *sec.* 748; *State agt. Green-*

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wood, 5 Porter, 474; *State* agt. *Leaben*, 4 Dev., 305; *State* agt. *Freeman*, 6 Blackf., 248; *Barney* agt. *State*, 12 Smed. & Marsh., 68; see subd. 8, this point). 4. And a motion to quash the indictment (1 *Bish. Crim. Pro.*, sec. 747). 5. The court may receive the suggestions from an *amicus curie* (*People* agt. *Jewett*, 3 Wend., 814; 16 *Am. Law Rev.*, 231; *Bonlo* agt. *State*, 51 Ala., 19; *McEhannon* agt. *People*, 92 Ill., 369, 372). 6. Although challenges to the array of grand jurors are abolished, the court may grant relief to a defendant on special motion (*United States* agt. *Reed*, 2 *Blitch.*, 436; *United States* agt. *Tallman*, 10 *Blitch.*, 29; *People* agt. *Southwell*, 46 Cal., 153). It is inherent in courts to control the proceedings taken therein, and the common law established by the statute of Henry vests in our superior courts the power to do justice to defendants without reference to forms. To illustrate, take the case provided for by section 270 of the Code of Criminal Procedure. It is declared therein that the dismissal of a charge by one grand jury does not prevent its being again submitted to another grand jury as often as the court may direct. But without such direction it cannot be again submitted. Suppose that, without such direction, a resubmission was made and an indictment found and presented, would there be no remedy for the defendant? The Code, in express terms, provides none; but to prevent the consummation of such an outrage and the defiance of the express mandate of the Code, the inherent right of the court to protect its own dignity and to control its proceedings, would be sufficient authority to right the wrong so done (*Baldwin* agt. *New York*, 42 Barb., 549; *McGuire* agt. *The People*, 2 *Purk. C. R.*, 162; see 13 *Northwestern Rep.*, 477). The offense charged in the indictment is alleged to have been committed on the 2d day of August, 1881; this being anterior to the Code of Criminal Procedure going into effect, we are not in any way embarrassed by its provisions, as they apply only to cases occurring after September 1, 1881, when said Code went into effect (*Code of Crim. Pro.*, secs. 962, 953; *The People* agt. *Sessions*, 10 *Abb. N. C.*, 192). Independently of this statutory reservation, the legislature could not deprive the defendant of any substantial right he had at the time of the commission of an alleged offense (*Cooley's Const. Lim.* [4th ed.] 381). The rules therefore governing pleas in abatement prior to the Code, prevail in this case. Mr. Bishop says, adopting the definition of Starkie: "Pleas in abatement are founded either on some defect apparent on the face of the record, or upon some matter of fact extrinsic of the record, which render it insufficient" (1 *Bish. Crim. Pro.*, sec. 416). The proper time to interpose a plea in abatement is before plea of not guilty (*McQuillen* agt. *State*, 8 Smedes & Marsh., 587; *People* agt. *Allen*, 43 N. Y., 28; *Ward* agt. *State*, 48 Ind., 289). An objection to the mode of selecting persons from whom grand jurors are to be drawn, can be taken advantage of by the defendant by a plea in abatement after indictment found (*Clare* agt.

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State, 30 *Md.*, 168; *Stokes agt. State*, 24 *Miss.*, 621; *State agt. Dutell*, 49 *Greene*, 125; *Portis agt. State*, 23 *Miss.*, 578; *Elkins agt. State*, 1 *Tex. App.*, 539; *Schackelford agt. State*, 2 *Tex. App.*, 385; *State agt. Vance*, 31 *La. Ann.*, 398). The incompetency of the grand jurors who find a bill is a matter which may be pleaded in abatement (*Nugent agt. State*, 19 *Ala.*, 540; *State agt. Foster*, 9 *Texas*, 65; *Jackson agt. State*, 11 *Texas*, 261; *Rawls agt. State*, 8 *Sm. & Marsh*, 599; *State agt. Rickey*, 5 *Halst.*, 83; *State agt. Greenwood*, 5 *Porter*, 474, 483; *Shropshire agt. State*, 7 *Eng.*, 190; *Baker agt. State*, 23 *Miss.*, 243; *State agt. Brooks*, 9 *Ala.*, 10; *State agt. Wills*, 11 *Humph.*, 222).

"Since the statute has abolished challenges to the array (2 *R. S.*, 724, *sec.* 26, 27), it may be conceded that a plea in abatement can be interposed to an indictment setting forth that the finding of the indictment was by an illegal body" (*FANCHER, J., Stokes agt. People N. Y. Sup. Ct.*, reported 1 *Whart. Cr. Law*, *sec.* 472, *n. c.*). Where the petit jury have not been drawn in the mode prescribed by law, the trial, conviction and sentence are null and the prisoner stands as though he had not been tried (*State agt. Da Rocha*, 20 *La. An.*, 356; *U. S. agt. Woodruff*, 4 *McLean*, 105). 11. If the legislature pass an act in contravention of the constitution, it would be illogical and revolutionary to sustain any other doctrine, but that it cannot pass another act either contemporaneously or subsequently providing that one affected by the unconstitutional law cannot take advantage of it. Every one has a vested right to claim the benefit of constitutional provisions, and he must have some way of asserting his right. "There is no doubt * * * that a statute which should deprive a party of all legal remedy would necessarily be void" (*Potter's Ducarris Stat.*, 474). "The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime" (*Cooley's Const. Law* [4th ed.], 331; *Flint River Steamboat Co. agt. Foster*, 5 *Geo.*, 194). If, therefore, it be claimed that the proper construction of the Code of Criminal Procedure will prevent a defendant from interposing any objection to a grand jury on fundamental points, it runs clearly in conflict with the constitution. That instrument (*art.* 1, *sec.* 2) declares that trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever; also (*art.* 1, *sec.* 6) provides that no person shall be held to answer for a capital or otherwise infamous crime (except in certain cases named), unless on presentment or indictment of a grand jury. In criminal cases jury trials are jealously guarded. Constitutional provisions cannot be waived, for it is deemed in such cases that there are more than personal interests involved, that the rights and interests of the public are concerned (*Proffatt on Jury Trial*, *sec.* 118). It would be incompetent for the legislature to abolish the trial by jury, or to enact that a defendant could not in any way at any

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time object to an illegal jury; or in the case of an indictment so to arrange it that an unlawful body of men could assemble and assume to act as a grand jury, perpetrating outrages by presenting unfounded indictments and then say to the persecuted parties you cannot object to this body. A body of men not constituted as the law provides is not a grand jury, and those accused of crime have the right before being placed on trial for a criminal accusation to have the benefit of presentment or indictment by a legal grand jury, as the constitution could not have intended to mean an illegally organized grand jury. "The right must not be restricted by conditions which would practically impair or render it unavailing. While it is decided to be reasonable in civil cases to require a bond for the prosecution of an appeal to a jury, or to pay costs or to prepay the jurors fees in the first instance when a jury is demanded, the same restrictions are not permitted in criminal cases. Hence a statute requiring a court upon appeal in a criminal case to impose a penalty in case of conviction in double the amount imposed by the court below, is, in that respect, unconstitutional" (*Proffatt on Jury Trial*, sec. 102; *State agt. Gurney*, 87 *Me.*, 156; *Lord agt. State*, *Id.*, 171; *McClellan agt. State*, 11 *Neb.*, 45).

X. The chapter in question is a plain and clear violation of the constitution. The duty of courts in such case is well expressed by judge SMITH in *Clark agt. City of Rochester* (24 *Barb.*, 466): "It is the exclusive province of the legislature to enact the laws and to pass upon all questions relating to their expediency, the time, manner and mode of their operation. It pertains to the judiciary to interpret the laws thus enacted, and to carry the same into effect. Acting in common with the legislature, under the constitution, which both are sworn alike to support, it is our duty to bring all laws, when called upon in due form to enforce them, to the touchstone of the constitution, and to pronounce against the validity of all acts clearly in conflict with the fundamental law."

XI. The judgment of conviction should be reversed, and as the indictment is fatally defective, the defendant should be discharged (*Sauser agt. The People*, 8 *Hun*, 302-305).

D. Cady Herrick, district-attorney, for the people.

I. The conviction should not be reversed for refusal to quash indictment. The general rule being that an indictment charging the higher crimes will not be thus summarily disposed of (*People agt. Walters*, 5 *Parker*, 661).

II. The paper filed containing the objection to the grand jury did not constitute a plea to the indictment (*Cox agt. People*, 80 *N. Y.*, 500, 510). As to challenges to grand jurors, see 3 Revised Statutes (6th ed.), 1018, sections 27, 28; *People agt. Harriott* (8 *Parker*, 112).

III. The manner in which the jurors were selected is something to which the defendant can take no exception, as he has no interest in it. (*Friery agt. People*, 2 *Keyes*, 425; 2 *Abb. Ct. of App.*, 229).

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IV. It is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature that the body acted under color of lawful authority. Irregularities do not affect it (*People agt. Dolan*, 6 *Hun*, 232; 6 *Id.*, 493; 64 *N. Y.*, 485; *Thompson agt. People*, 6 *Hun*, 135; *People agt. Jewett*, 3 *Wend.*, 314; *Ferris agt. People*, 31 *Howard*, 145).

V. The Code of Criminal Procedure expressly prohibits challenge to the array (*Sec. 238*). The Code was intended to simplify the law and reduce it to a complete and harmonious whole (*Hickman agt. Pinkney*, 81 *N. Y.*, 211, 215; *People agt. Brooklyn*, 60 *N. Y.*, 605).

VI. The challenge to the petit jury was properly overruled (*Wharton's Pl. & Pr.*, sec. 607; *Proffitt on Jury Trial*, sec. 149; *Pringle agt. Huss*, 1 *Cow.*, 436, n.; *Gardner agt. Turner*, 9 *Johns.*, 261).

VII. The only law enacted by a legislature that cannot be amended or repealed is one that embodies a contract (5 *McLean*, 161; 28 *Ind.*, 364; 23 *Ind.*, 150; 14 *Wis.*, 623).

VIII. Hitherto the argument has proceeded upon the assumption that the act in question was not reported by commissioners to revise the statutes. Is it clear to the court that the act must have been so reported to make it constitutional? If the court is in any doubt it must uphold the law. Nothing but a clear violation of the constitution will justify the court in overriding the legislative will (*O. C. R. Co. agt. Twenty-third St. R. R. Co.*, 54 *How.*, 180; *Matter of N. Y. El. R. R.*, 2 *Abb. N. C.*, 413). Every presumption is in favor of the validity of legislative enactments. They are presumed to be passed in accordance with the constitution (70 *N. Y.*, 356), and every intendment and presumption is in favor of the constitutionality of legislative enactments (9 *Hun*, 190; 54 *How.*, 180; 17 *N. Y.*, 549; 3 *Abb. N. C.*, 413; 70 *N. Y.*, 342). We know that in 1877, 1880 and 1881, Codes reported by commissioners to revise the statutes were enacted into laws. The laws of 1847 (*p. 66*) provides the first commissioners, and for filling vacancies. The presumption then is, that if the law required them to report the amendment in question before the legislature could lawfully enact it into a law, that they did so report it, or the legislature would not have passed it.

IX. Proof cannot be given to show that the act or amendment in question was not reported by commissioners (33 *N. Y.*, 279, 283; 70 *N. Y.*, 351).

LEARNED, *P. J.*—The prisoner was indicted September 19, 1881. When arraigned he filed a plea setting forth certain alleged defects in the forming of the grand jury which indicted him. The district attorney filed a replication and the prisoner a rejoinder. The prisoner offered to prove certain facts set up in his plea. The court excluded the evidence,

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and, on the motion of the district attorney, overruled the rest of the plea. Thereupon the defendant demanded a trial and pleaded not guilty.

No such plea as that offered by the defendant is now allowed (*Code Crim. Pro.*, secs. 273, 332). And a plea must be oral (*Sec.* 333). It was proper, therefore, to require the prisoner to plead one of the three pleas authorized by section 332.

The prisoner, upon pleading not guilty, moved to set aside the indictment on the ground that the grand jury was unlawfully selected and drawn, and for the reasons stated in his plea, and offered to prove certain facts by legislative journals and by oral testimony. The offer was overruled.

He also moved to quash the indictment on the said grounds. This was overruled.

The Code of Criminal Procedure seems to have substituted a motion to set aside an indictment for the former motion to quash (*Sec.* 313). It must be set aside, when it is not found indorsed and presented as prescribed in sections 268 and 272. The only ground which the prisoner makes is that none of the persons who, as grand jurors, found the indictment were grand jurors. .

A motion to quash an indictment, and so a motion to set it aside, should be made upon affidavits. No affidavit appears in this case. We know of no practice by which the prisoner on such a motion offers to prove certain facts and endeavors to take exceptions to the exclusion of such offer. The proceeding is not a trial, but a mere motion, which must be based on affidavits. There are none here.

Again, so far as we can discover, the Code of Criminal Procedure has not provided for any review of the order granted on such a motion. Section 517 says that, on appeal, any intermediate order, forming a part of the judgment-roll as prescribed in section 485, may be reviewed. On turning to section 485 it will be found that the judgment-roll is not required to contain the proceedings on a motion to set aside the indictment. So that we find no authority for the review

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of an order setting aside or refusing to set aside an indictment. If it be suggested that the proceedings on that motion should appear in the bill of exceptions, and hence in the judgment-roll, the contrary is shown by section 455.

Furthermore, we find no order whatever refusing to set aside the indictment.

The legislature may well have thought that, as an indictment is only an accusation, it was sufficient to give the trial court power to set it aside, and was unnecessary to permit appeals from the action of that court.

It is, however, urged by the prisoner that the constitution provides that a person shall not be held to answer for such a crime, except on indictment of a grand jury (*Art. 1, sec. 6*). That the body which indicted him was not a legal grand jury; and that, therefore, he cannot be constitutionally deprived of his right to assert that he was not so indicted. That may be so; the prisoner did assert that he was not legally indicted, by his motion to set aside the indictment; and that was decided against him. We do not understand that there is any constitutional provision which allows a party always to appeal to the highest court, even when his grievance is that a constitutional right has been infringed. When, and on what grounds, appeals shall be allowed are questions for the legislature. So that unless a right of appeal has been given from an order, refusing to set aside an indictment, we cannot hear that question. This paper was not a challenge to the array of grand juries, for none is allowed (*Code Crim. Pro., sec. 258*). And after indictment found there could plainly be no challenge to the grand jury individually (*Sec. 239*). So far as the indictment is concerned, the prisoner's remedies are those given in section 313. But if we could review the refusal to set aside the indictment, we should find no error. Proceedings are not affected by imperfection in matters of form (*Code Crim. Pro. sec. 285*). A grand jury is defined in section 223; the prisoner's allegation is that the persons who found the indictment were drawn by the officers, under claim

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of law, from the petit jury box instead of the grand jury box. But if this be a ground of objection, it must be so under section 238, subdivision 1, Code of Criminal Procedure. And that section leaves it to the discretion of the court to discharge the panel. The court in which the indictment was found had jurisdiction. Persons were returned to that court as grand jurors, and were sworn and acted as such, and thus they formed a legal grand jury (*Dolan agt. People*, 13 *Sup. Ct. N. Y.*, 494).

The prisoner having pleaded not guilty, a jury was ordered to be impaneled. Thereupon it appears the prisoner's counsel objected to the panel of jurors, and to each juror, upon the ground that chapter 532 of the Laws of 1881 was unconstitutional, being a local act, &c., "and offered to substantiate the same by proof, which was objected to, sustained and an exception taken."

An objection to a panel of jurors and to each juror must have been intended as a challenge, that being the only mode known to the law of making such objection (*Code Crim. Pro.*, sec. 359).

Now, the first difficulty in regard to this challenge to the panel is, that such a challenge must be in writing (*Sec. 363*). No written challenge appears. The so-called plea referred only to the grand jurors. The next difficulty is that no facts are stated sufficient to constitute a challenge. It is not alleged that the petit jurors were drawn under chapter 532 of the Laws of 1881. Again, none of the proceedings required by sections 365 and 366 were taken. So that here was no exception to the challenge (*Sec. 364*); a denial of the challenge (*Sec. 366*); a trial of the challenge (*Sec. 377*). We do not know whether the court held the challenge to be sufficient, or the allegations to be untrue. Nor does it even appear what evidence was offered, so that we can judge whether it was properly excluded or not.

If we overlook all these difficulties and suppose that the court held the challenge insufficient, was there any error? A

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challenge to the panel can be founded only on a material departure, to the prejudice of the defendant, from the forms presented by the Code of Civil Procedure in respect to the drawing and return of the jury (*Sec. 362*). The other ground contained in that section is not claimed. The forms prescribed for the drawing and return of the jury are found in the Code Civil Procedure (*Secs. 1043 to 1048*). An examination of those sections will show that there is nothing in them on which this challenge could be based. It is not alleged that the clerk did not conduct the drawing of jurors in the very manner prescribed by these sections. His duty is to draw the jury from the box containing the ballots (*Sec. 1027*). These ballots he is previously to prepare (*Sec. 1038*). The right to challenge the panel, says nothing in express words as to a challenge for any material departure in respect to the preparing of the ballots. And the legislature may have thought that against the introduction of improper persons by the clerk, in preparing the ballots, the prisoner was sufficiently protected by his right to challenge individual jurors for cause (*Code Crim. Pro., secs. 375 to 377*).

For if we overlook all the difficulties which we have seen stand in the prisoner's way on this appeal, and inquire what would have been his ground of complaint if he had properly presented it, we shall find it to be this: that the county clerk, in preparing ballots and putting them in the box under section 1038, Code of Civil Procedure, put in names which had not been selected by the proper officers. It is not claimed that a list had not been made out and filed with the clerk, or that he did not make his ballots from such list. But it is claimed that such list was not made out by the officers authorized to make the same; but was made by other officers claiming the legal right. Nor is it pretended that there was any list from which the clerk could prepare ballots, except that list from which he did prepare them. How, then, can it be claimed that in drawing this jury the clerk departed from the forms of section 1047, Code of Civil Procedure. The legis-

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lature may well have refused to give any right of challenge for any fault or error in the preparation of the jury list; provided only that the clerk properly drew the trial jury from the box of ballots prepared by him.

Assume then, for the present, that the list of names of all persons believed to be qualified to serve as trial jurors was made up by the wrong officers; what is that to the prisoner? If any juror drawn on the trial is objectionable, he can be challenged. This list is made up, and the system of drawing jurors by the clerk is adopted "to secure a due and uniform distribution of jury duty, and to guard the great body of jurymen from the fraud or favoritism of the drawing and summoning officers" (*Friery agt. People*, 2 *Abb. Ct. App.*, 230). Challenges to the array existed formerly for the reason that there might be prejudice on the part of the sheriff. Now since such prejudice cannot affect the drawing, these challenges have been limited as above stated (*Code Crim. Pro.*, sec. 362), and there must be a departure "to the prejudice of the defendant." No prejudice to the prisoner is shown or suggested. These irregularities are of no consequence (*Car agt. People*, 80 *N. Y.*, 500).

But further, if the question of the constitutionality of chapter 532, Laws of 1881, were before us, we could not hold it to be unconstitutional. The restriction on the legislature contained in section 18, article 3 of the Constitution, is qualified by section 25 of the same act. The restriction does not apply to any bill or the amendments to any bill which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes. If this law is to be held unconstitutional, then it must be upon a finding of the fact that it was not so reported. Whether or not there were any such commissioners in 1881 is not decisive. They may have reported the bill several years before, although it was not passed by the legislature until 1881. We do not say that such is the fact; only that it is possible. Then the constitutionality of the law must

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depend, not on the construction of language which is a matter of law, and, therefore, of conclusive judicial decision, but on a question of fact, which may be found by one tribunal in one way and by another tribunal in another. On the trial of this present case, the court might, on the question of fact, have found that the commissioners did report the bill, and have held the law, therefore, constitutional. At the next court the same question may arise, and the court may find that the commissioners did not report the bill, and, therefore, hold the law unconstitutional.

When the constitution permitted the legislature to pass such a law, if reported to them by certain commissioners, it necessarily made the legislature the judges of the fact whether the law had been so reported. Their decision must be conclusive. No other rule would be tolerable. The constitutionality of laws cannot be permitted to depend on the possibly varying decisions of courts or juries on mere question of fact, especially on a fact as to which the legislature had special knowledge (*Matter of N. Y. Elev. R. R.*, 70 *N. Y.*, 351; *People agt. Doolin*, 33 *N. Y.*, 279).

The judgment and conviction should be affirmed.

The same in the other case against the same prisoner.

BOCKES, *J.* — The defendant was indicted in the Albany county sessions, September, 1881, for the crime of grand larceny, committed in August of that year. He was tried at the March term of that court, 1882, was found guilty, and was sentenced to imprisonment in the penitentiary for the period of five years.

When arraigned he interposed objections to the finding of the indictment in various forms; all, however, centering in this: that the grand jury which found the indictment was drawn from the names of persons selected by the recorder of the city of Albany, instead of from a list of names of persons selected by the supervisors of the county, and from the petit jury list; which proceeding, in that regard, was taken

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under and pursuant to section 1041 of the Code of Civil Procedure, as amended by chapter 532 of the Session Laws of 1881; whereas, as was insisted, such section, as amended, was unconstitutional in so far as it provided for the selection of grand jurors in and for the county of Albany by the recorder of that city; hence that the grand jury should have been selected and drawn under and pursuant to the provisions of the Revised Statutes, which, as was claimed, remained in force.

The objections so urged against the indictment was overruled by the court and the defendant was put to his plea of not guilty.

The objection interposed was in the nature of a challenge to the array. It went to the entire panel, and was based on alleged vice or irregularity in the selection of the grand jurors by whom the indictment was found. It can make no difference as regards the examination of the question before the court, that the objection was made by formal plea, like a plea in abatement to the jurisdiction of the court or for misnomer. This was but a mode of presenting the question for decision. The point to be determined by the court was whether, on the alleged facts, the indictment was regularly found—whether the defendant was bound by the law to make answer to it, on the merits, as to his guilt or innocence. The mode of presenting the question is quite immaterial. Whatever may be the form of its presentation, the question is whether the objection, based on the alleged facts, was properly overruled. It is proposed, however, to examine the case in all its aspects, at least in so far as is needful to dispose of it as here presented.

The defendant's counsel insists that the question presented for decision must be considered under the provisions of the Revised Statutes; this, on the hypothesis that the act of 1881 (*chap.* 532) is unconstitutional and void, and that, as a consequence, the provisions of the Revised Statutes bearing on the subject remain in force.

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Now let this be conceded and let it be also admitted that the objection to the indictment is, in effect, a challenge to the array, and should be so considered, and the objection is met and answered by section 28 of the Revised Statutes (2 R. S., 724, *marginal paging*), which declares that no challenge to the array of grand jurors shall be allowed in any other cases than such as are specified in the last preceding section (27), which section (27) does not include the ground here relied on. As was said by SELDEN, J., in *Dawson agt. The People* (25 N. Y., 404-405), this statute "limits the grounds of challenge by persons charged with crime to the prosecutor or complainant making the charge, and the witnesses to sustain it." This provision was doubtless intended to cover matters of singularity in obtaining the panel of grand jurors, recognizing the fact that the substantial rights of the accused could be and would be fully protected to him on the trial upon the indictment before the petit jury. If, therefore, it be assumed that the case is one of challenge to the array, and that the question raised is to be controlled by the provisions of the Revised Statutes, it follows that the objection urged is nullified by the sections above cited (*Carpenter agt. The People*, 64 N. Y., 483). Besides, it has been repeatedly decided that irregularities in the selection or drawing of grand jurors not affecting the substantial rights of the accused, as regards the question of his guilt or innocence, is not good ground of challenge to the array (*Friery agt. The People*, 2 Keyes, 424; *Cox agt. The People* 80 N. Y., 500-511; *Dolan agt. The People*, 64 N. Y., 485; *Same case, in Sup. Ct.*, 6 Hun, 232 and 493). In *Dolan's case* the question was considered (as stated by judge DANIELS), on what was relied upon as a plea in abatement (*See, also, statement of the case* 64 N. Y., 486-487). In this case judge EARL says: "Courts do not look with indulgence upon objections to irregularities in the mode of selecting or drawing grand jurors committed without fraud or design, which have not resulted in placing upon any panel disqualified jurors." But the defendant's counsel insists

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that these authorities relate to mere irregularities, and do not reach the case in hand, inasmuch as the ground of objection here is vital, such as (if admitted) depriving the array of the character of a legal panel. Now in Dolan's case, the ground urged was the same as is here urged, to wit: that the pretended grand jury which found the indictment was not a grand jury in and for the city and county (64 *N. Y.*, 486-487); that it was not "lawfully created and organized" (6 *Hun.*, 495); yet the objection was held inadmissible. The objection in that case was as "vital" and as much deprived "the array of the character of a legal panel" as in the present. I shall have occasion hereafter to refer more particularly to the ground of objection in Dolan's case. But attention is here called to the remarks of judge EARL in that case. The learned judge says: "The plea contains no allegation of any corruption, dishonesty or unfairness on the part of any of the officers in selecting and drawing the grand jurors, or of any design to injure the defendant or any other person, and it contains no allegation that any of the persons who were upon the grand jury which indicted the defendant did not possess the qualifications of grand jurors, or that any person was upon the jury who would not have been there if all the forms of law which are claimed to have been disregarded had been complied with. It is not apparent how the alleged irregularities harmed the defendant, and it is certain that they had no relation whatever to the question of his guilt or innocence of the crime charged. Under such circumstances the indictment should be upheld, unless the facts pleaded point out some vital error." As above suggested, the objection there under consideration was no less vital than it is in this. The remarks of Mr. justice DANIELS, in Dolan's case, when in this court, are in line with those of judge EARL above quoted (6 *Hun.*, 494; *see, also, The People agt. Dolan*, 6 *Hun.*, 232, and *Friery agt. The People*, 1 *Keyes*, 424). From these and other cases it would seem, therefore, that these alleged errors urged by the defend-

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ant as ground of objection to the indictment are untenable, inasmuch as it is not made apparent that he was or could be in any way injured or prejudiced by them.

But there is another answer to the objections urged which seems entirely conclusive against their allowance.

The court in which the indictment was found had undoubted jurisdiction of the case. The list of names of persons to serve as grand jurors was made up from the right source — that is, from the body of the court — and the names of the persons drawn to serve as grand jurors were, as must be presumed, certified to the court in due form by the record. It is not pretended but that they were drawn by the proper officers; nor but that they were, one and all, duly qualified to serve and act as grand jurors in and for the county of Albany; nor but that they were honest, intelligent and impartial, were duly summoned and impaneled in due form, and in all respects performed the duties of grand jurors according to the forms of law. Considered as officers of the law to aid in the administration of justice in criminal cases, they constituted a *de facto* body in the exercise of legal functions, under color of lawful authority. So it was held in *The People agt. Dolan* (6 Hun, 232), that it was sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under color of lawful authority, and according to the case of *Thompson agt. The People* (6 Hun, 135), it would not alter this conclusion even if the selection of the grand jurors involved, in the proceeding, the acts of an officer holding his office under an unconstitutional law. It was then decided that such officer must be deemed an officer *de facto*, whose acts could not be brought in question in a collateral proceeding between other parties. True, this latter decision was made with reference to the panel of petit jurors, but the principle thus declared is equally applicable to a case where like objection is urged to the panel of a grand jury. But the decision in Thompson's case meets and answers the precise point urged here, to wit: that the

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recorder of the city of Albany assumed to act and did act in the selection of the jury list without authority, under and pursuant to an unconstitutional law. It was then directed that a challenge to the array by the accused could not be sustained, even were it true that the panel was selected by the commissioner of jurors, appointed under an unconstitutional law; that such officer must be deemed to be an officer *de facto*, whose acts could not be brought in question in a collateral action or proceeding. It is the well settled rule that the title of an officer *de facto* cannot be assailed collaterally; that the acts of such officer are valid in so far as the public and third persons are concerned (*Thompson agt. The People*, 6 Hun, 138, and cases there cited; *Dolan agt. The People*, 24 N. Y., 495; *Carpenter agt. The People*, 24 N. Y., 483; *Dolan agt. Mayor*, 68 N. Y., 278, 279; see, also, 5 *Wait's Actions and Defenses*, 7, and the many cases there cited). As above stated, it matters not that one of the officers, through whose instrumentality the jurors were obtained, held his position under an unconstitutional law. In *Thompson agt. The People*, a challenge to the array was interposed — the alleged ground thereof being that the panel of jurors was selected by Dunlap, acting as a commissioner of juror under appointment by the mayor of the city of New York, in pursuance of an alleged unconstitutional law. The district attorney demurred to the challenge, and it was disallowed. It was then said, "it is enough, in all cases, when such a question is raised collaterally, that the person acting as an officer is discharging the duties of the office under color of right, evidenced by his possession of the office, and by exercising its functions under the power of an appointment or election independently of the question of legal title; hence the court below was entirely right in holding that Dunlop's official acts could not in this case be questioned by challenge on the ground alleged." To the same effect are the remarks of DANIELS, J., in *Dolan's case* (6 Hun, 499), where the objection urged was of the same character as in *Thompson's case* (64 N. Y., 483), and where

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the objection was raised by what was designated as a plea in abatement. A like objection was raised in *Carpenter's case* (64 N. Y., 483), to wit: That the act of the legislature under which Dunlop was appointed commissioner of jurors was unconstitutional. The court held that he was an officer *de facto*, whose acts were valid as to the public; that this validity of his appointment cannot be drawn in question in this collateral manner. In *The State agt. Carroll* (38 Conn., 449), it was decided that one acting under color of an appointment by or pursuant to a public unconstitutional law before it was adjudged to be such, was to be deemed an officer *de facto*, and that his acts as such were valid as to the public and third persons. This subject received a very elaborate examination in this case on the authorities, as well as those of older date, as of a more recent period. In *The Commonwealth agt. McCombs* (56 Penn., 436), it was held that a person who holds an office under the apparent authority of a statute as an officer *de facto*, whose title could not be assailed collaterally, even though the statute be unconstitutional. But it is said that the office of recorder was well filled by an officer holding under authority good both in fact and law; that it is not disputed that he was recorder and might well perform the duties pertaining to that office. But the point is urged that other rights and powers were attempted to be conferred on him by an unconstitutional law. The case, however, is not changed by this view of it; and for the reason that the recorder was an officer *de facto* as regards the duties imposed on him by the law here challenged — as much so as if a new office had been thereby created and he had been appointed to perform its duties. He was not a usurper as regards the performance of those duties in any legal sense. A usurper is one who undertakes to perform official acts without any color of right. Here the recorder acted certainly under color of right. His action had the sanction of an apparent law, duly certified to him and to the people as a valid law of the state. It may, too, be here added that it stands undisputed

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that the legislature, under a certain condition or state of facts, had the constitutional right to pass precisely this law. Now, every law which the legislature may pass is presumed, when duly certified as a law of the state, to be valid. To meet this point, a fact was averred which, if proved, would, as was insisted, render the law unconstitutional. But proof of such fact would be inadmissible (*The People* agt. *Devlin*, 33 *N. Y.* 269, and cases there cited; *Matter of N. Y. Elevated R. R. Co.*, 70 *N. Y.*, 351). In this latter case judge EARL puts the inquiry, "can the court take proof for the purpose of showing a statute, valid and regular upon its face, to be unconstitutional?" and gives a negative answer. Then, in executing such law, or in executing any law, indeed, duly certified as a valid law of the state, can it be maintained that the officer appointed to carry its provisions into effect acts, in so doing, without the semblance or color of authority? The cases above cited, and many others referred to in those cases, answer this question in the negative. It is repeatedly and repeatedly declared in the decisions of the courts that an unconstitutional law gives the semblance or color of authority to its provisions. There was nothing decided in *Lambert* agt. *The People* (76 *N. Y.*, 220), in conflict with the cases above cited. The precise point here under discussion was not in that case; and as it seems the views of the several members of the court on the subject then considered were not in all respects in harmony. We conclude, therefore, that the objection here urged against the indictment was properly overruled; and this whether it be deemed to be a challenge to the array or considered as a plea in abatement. In either case the ground of objection must be held untenable.

So far the case has been considered without regard to the provisions of the Code of Criminal Procedure.

But if the case is to be determined under the provisions of this Code, which went into effect on the 1st of September, 1881, before the indictment was found (*see section 962*), and admitting the invalidity of the law of 1881, because of its

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alleged unconstitutionality, thereby section 238, the objection, being a challenge to the panel or array, was inadmissible.

This section (238) declares that no challenge can be allowed to the panel or to the array of the grand jury; but provides that the court may, in its discretion, discharge the panel and order another to be summoned in certain specified cases. This section, however, has application to proceedings to be taken before indictment found. The proceedings permissible to the accused after indictment are provided for in subsequent sections. Section 312 provides that the defendant may, when arraigned, move the court to set aside the indictment, or may demur or plead thereto. Sections 312 and 313 declare in what cases only he may have the indictment set aside. The specified grounds of such motion do not touch the case in hand. We are then brought to section 321, which declares that the only pleading allowed to the accused is either a demurrer or a plea. Section 322 declares the cases in which a demurrer may be interposed, and confines the demurrer to matters appearing on the face of the indictment. This section has here no application. Then section 332 provides for three kinds of pleas, to wit: Guilty, not guilty, and former conviction or acquittal. No other pleas are allowed by the Code. The objection in this case, therefore, considered even as a formal, technical plea of matter in abatement was inadmissible under the Code of Criminal Procedure. Thus, if it be admitted that the case is to be determined under the provisions of the Code of Criminal Procedure, the objection urged was properly overruled.

In view of the conclusions above reached, it becomes unnecessary to examine the question raised by the defendant's counsel as to the validity of the act of June 16, 1881 (*chapter* 532). We are of the opinion that the defendant was properly put to his plea to the merits.

He pleaded not guilty. On the trial, upon such plea and in the outset, the same objections were "interposed to the panel of the petit jury as had been previously urged against

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the panel of the grand jury, to wit: that the jurors had been selected from the body of the county, under and pursuant to the act of June 16, 1881, chapter 532, which act, as was claimed, was in violation of the constitution and void in so far as it provided for the selecting and drawing of jurors in and for the county of Albany. This was in effect, and in fact, a challenge to the array of the petit jury. Was this objection or challenge properly overruled? The same answer must be given as was above made to the objection to the panel of grand jurors, that is: the jurors were selected from the right source—from the body of the county; they were duly drawn, summoned and returned to the court pursuant to the provisions of the law, by officers acting under the color of lawful authority; and they were in all respects duly qualified and competent to act as petit jurors in and for the county of Albany. According to the decisions above cited, the objection was properly disallowed, because the officers through whose action the jurors were selected, drawn and summoned were officers *de facto*, if not *de jure*; officers in possession of office, acting under color of lawful authority.

It should be added, perhaps, that section 562 of the Code of Criminal Procedure fully answers the objection interposed to the panel of trial jurors, if it be admitted that the case comes within its provisions.

It follows, therefore, that without considering the question as to the constitutionality of the act of 1881, the conviction and judgment appealed from must be affirmed.

MEM.—The decision in the case against the defendant for grand larceny disposes of this case also.

It should be noted, however, that this case is undeniably subject to the provisions of the Code of Criminal Procedure, which went into effect before the offense charged in the indictment was committed.

Conviction and judgment affirmed.

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WESTBROOK, *J.* (dissenting)—Involving, as this case does, the constitutionality of the law (*chap. 532 of the Laws of 1881*), under which grand and petit jurors are selected in and for the county of Albany, and unable to agree with my associates either in their conclusion that the conviction for the crime of grand larceny should be affirmed, or in the arguments assigned by them for such conclusion, it would seem to be proper that my reasons for such dissent should be stated.

On the 19th day of September, 1881, there was filed with the clerk of the county of Albany, a paper purporting to be an indictment found by a grand jury of the court of sessions of Albany county, accusing the appellant, John Petrea, of the crime of grand larceny, committed at the city of Cohoes on the 2d day of August, 1881.

On the 21th day of March, 1882, Petrea was brought before the court of sessions of Albany county to answer to the alleged indictment. Seeking to avail himself of the constitutional protection (*art. 1, sec. 6*), that "no person shall be held to answer for a capital or otherwise infamous crime" (except as is stated in the section referred to) "unless on presentment or indictment of a grand jury," the accused filed a written plea or objection, which denied the finding of an indictment against him by a grand jury, and claimed as the necessary corollary that the court had no jurisdiction to place him upon trial for an alleged infamous crime. No objection was taken by the people to the form or manner of presenting the question, and the court, in rendering its decision, did not put it upon the ground that a formal motion to quash the so-called indictment upon affidavit served had not been made. Nor would any such objections, if made, been tenable (*Clare agt. The State, 30 Md., 165; Stokes agt. The State, 24 Miss., 621; State agt. Newhouse, 29 La. Ann., 824*).

Very clearly, if the facts alleged in the writing presented to the court were in truth as therein set forth, and if the legal conclusions to be deduced from such facts were those maintained by the accused, then it must follow that he could not

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be placed upon trial, nor convicted. The paper presented was not a plea "to an indictment," and as such controlled by section 332 of the Code of Criminal Procedure. It admitted no indictment, and denied that one had been found. Neither was it a challenge to the array of grand jurors, nor to an individual grand juror, and therefore controlled either as to form or substance by sections 238 and 239 of the Code of Criminal Procedure. The prisoner, so far as the case discloses, was not present at the organization of the body called a grand jury, and had no opportunity to challenge it either as a whole or in part. The labors of the men composing it were ended, but in the possession of the tribunal before which the accused was brought was a paper said to be an indictment found by a grand jury, which he was called upon to answer. The objection he made was radical, it was aimed at the jurisdiction of the court to place him on trial, and denied that he was indicted, upon the ground that no grand jury had presented the accusation upon which he was arraigned. No objection was urged to a form, none to an informality in the exercise of a power conferred. The point made went much further. It insisted, not only that the paper was no indictment, as it was claimed to be, but that its existence and presence was a violation of the fundamental law, and the attempt to try him thereon an outrage upon his rights as a citizen. Unless, then, the court is prepared to hold that every paper bearing the external form and impress of an indictment is one in fact, and that what it purports to be cannot be questioned by the party arraigned, then the written objection made to the alleged indictment, if true in the statement of facts, and sound in its legal conclusions, could not possibly be overruled upon the grounds that it was not such a plea as the Code (*sec.* 332) allowed, nor such a challenge to grand jurors as is provided for by other (338, 339) sections. The Code cannot be construed as intending to deprive a person of a great constitutional right, and if it be capable of any such construction, which it clearly is not, such a barrier would be futile, for it is a legal impossibility by a

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statute to deprive a party of his right to claim constitutional protection, or to state the proposition more clearly with reference to this case, it is impossible, under color of legislative enactment, to organize a grand jury in a mode forbidden by the constitution, and prevent, under the like color of legislation, the aggrieved party from being heard in assertion of his rights. Its author, and the body which adopted it as a law, intended no such absurdity as an attempt to prevent by an enactment defining and limiting the grounds of challenge to grand jurors, or the pleas to be made to an indictment when one is properly found, a preliminary inquiry by the court to ascertain whether there is, in fact, an indictment before it, to which the accused is compelled to answer. This proposition is so elementary and fundamental that its soundness will be assumed, and attention will be given to the contents of the paper filed and the proceedings thereon.

The substance of the paper submitted by the prisoner to the court was that the alleged indictment to which he was asked to plead was not an indictment in fact, because not found by a grand jury of the county of Albany. That not a single one of the individuals named and called therein grand jurors was a grand juror in fact, because not a solitary member of that body had been selected, summoned or called according to law, but one and all had been selected, summoned and called under and in pursuance of chapter 532 of the Laws of 1881, which was "obnoxious to, and in contravention of, the constitution of the state of New York, which forbids the passage by the legislature of a private or local bill for selecting, drawing, summoning or impanneling grand jurors, and that the said chapter 532 was not reported to the legislature by any commissioner or commissioners who had been appointed pursuant to law to revise the statutes."

By the replication to this plea, the district attorney admitted and declared that the "said grand jury was selected and drawn pursuant to chapter 532 of the Laws of 1881, as in said plea stated; and as to the other allegations, matters and things in

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said plea stated, he denies the same, each and all; and this he, the said district attorney, prays may be inquired of by the country."

The prisoner filed a rejoinder to such replication in which he said, "that all matters of fact in his said plea stated are true, and constitute good and sufficient reasons for sustaining the same; and the said John Petrea joins issue upon the allegations in said replication stated; and of this he, the said John Petrea, puts himself upon the country."

The court then held that the legal presumption was in favor of the constitutionality of the law, and that the burden was upon the prisoner to show that the act of 1881 was not one reported to the legislature by the commissioners of the Code. Whereupon the counsel of the prisoner "offered to prove by the clerk of the senate, by the commissioners appointed to revise the statutes, by the journal of the legislature of 1881, and by the original law itself, that the law in question was not reported to the legislature by any commissioner or commissioners who are or had been appointed, pursuant to law, to revise the statutes."

This evidence was objected to by the counsel for the people "as immaterial, incompetent and inadmissible," which objection was sustained and an exception taken.

The defendant then offered to prove by the same kind of evidence mentioned in his first offer, "that the said act of 1881 was introduced in the legislature by a member of that body, who was not and never had been a commissioner appointed to revise the statute or any statute."

This offer was also overruled, and on the motion of the people "the balance of defendant's plea" was "overruled," and he was called upon to plead, the court saying: "In this case we have to say that it was the defendant's duty to file objection to the legality of this statute at the earliest practical moment after the indictment was found. He omitted to do that, and we think he should not be permitted to avail him

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self of the plea at this late day, and so hold." To this decision there was also an exception.

So far as the case discloses, the defendant did make his objection at the first opportunity. When brought before a court to answer an accusation of crime alleged to be an indictment, it was then, and only then, his duty to interpose his objection. Prior to that time, the act of 1881, and proceedings thereunder, did not concern him any more than they did any other citizen. It was enough to do just what he did do, to wit, upon his arraignment make the point. This was not only then done in the manner already mentioned, but after his offers and written plea were overruled he renewed them by a motion and an offer of proof. This was also refused, and the several rulings of the court sharply present the following questions:

First. Conceding that the act of 1881 was not "reported to the legislature by commissioners who have been appointed to revise the statutes," is the enactment for that reason unconstitutional?

Second. Had the accused the right to show that it had not been so reported?

Third. Conceding that the statute is unconstitutional, and that the so-called grand jury which undertook to find the alleged indictment was organized thereunder, is the defendant without remedy?

These questions will be discussed in the order they have been stated.

In the consideration of the one first propounded, it is necessary to have clearly in mind the constitutional enactment. By section 18 of article 3 it is declared: "The legislature shall not pass a private or local bill in any of the following cases: * * * Selecting, drawing, summoning or impanneling grand or petit jurors;" and by section 25 of the same article it is provided that "sections seventeen and eighteen of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the legis-

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lature by commissioners who have been appointed pursuant to law, to revise the statutes."

These constitutional provisions are clear. "A private or local bill * * * selecting, summoning or impanneling grand or petit jurors" could not be passed unless the same was "reported to the legislature by commissioners who" had "been appointed pursuant to law to revise the statutes." There may possibly, owing to the peculiar phraseology of section 25, be some doubt whether or not the bill to be introduced, and all amendments thereto as well, should be reported by the commissioners. The act, however, certainly requires that the bill, which, when passed and approved, becomes a law, must be reported by such commissioners, and whether amendments to such bill, in the course of its passage, must also emanate from the same source, or could be adopted by the legislature, upon the suggestion of any of its members, is of no importance to the question before us. The literal reading of the section would seem to exempt only such bill and such amendments as were reported by the commissioners from the prohibition contained in section 18; while the intention, probably, was to give the legislature power to amend the bill when reported from the commission, as it might see fit. Speculation as to this point is, however, useless. The act of 1881 is not an amendment to a bill, but is an amendment of a law in full force, at the time of the passage of the former, and as the right of amendment, unless reported by the commissioners, existed, if at all, only whilst the report of such commission was in the form of a bill, by no possibility can section 25 be held to confer the power to so amend the work of such commission after it had become a law, as to make a valid legal enactment giving to the county of Albany a law, applicable to it, and to it only, for "selecting, drawing, summoning or impanneling grand or petit jurors."

Having demonstrated the proposition that the act of 1881, if it gave to the county of Albany a local jury law, which had not been reported by the commissioners appointed to

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revise the statutes, must be unconstitutional and void, the next inquiry is, what does the act seek to accomplish?

The second article of chapter ten of the "Code of Civil Procedure," as adopted by the legislature, provided a "mode of selecting, drawing and procuring the attendance of trial jurors in ordinary cases," but had no application to grand jurors. By it the supervisor, town clerk and assessors of each town made out the list, from which such trial jurors were to be drawn. By section 1041, "each ward of the city of Albany or Utica, is considered a town for the purposes of" that "article, and the supervisor and the assessor of that ward must execute the duties of the supervisor, town clerk and assessor of a town, as prescribed" in the preceding sections of that article. Special provision is also made in regard to other cities, but this is of no importance to the present discussion, and will not be stated.

The act (*chap.* 532) of 1881 undertakes to amend section 1041 of the Code by declaring that, "in the city of Albany, the recorder of said city shall perform the duties imposed by this title" (that is to say, the provisions of the Code in regard to the obtainment of trial jurors) "upon the supervisor, town clerk and assessors of towns;" and that thereafter, "in Albany county grand jurors shall be drawn from the box containing the names of petit jurors selected for said county in the same manner as petit jurors, and hereafter no separate list of grand jurors shall be prepared for said county."

The changes made by this statute, if valid, are radical. To the recorder of the city of Albany, only, and in contradistinction, as it is believed, of the powers of that officer in any other city in the state, is confided the duty of preparing the jury list, and from such list, when prepared by him, both the grand and petit jurors are to be drawn. Prior to its enactment, the recorder had nothing to do with the preparation of the lists from which either was selected. The preparation of that from which the trial jurors were to be obtained was by the Code of Civil Procedure devolved upon other officers, and

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that of the grand jurors, except in the city and county of New York, was to be prepared by "the supervisors of the several counties of this state * * * at their annual meeting in each year" (3 *R. S.* [6th ed.], 1015; 3 *R. S.* [7th ed.], 2558), the two lists being separate, and the ballots for the drawing kept in separate and distinct boxes.

These new provisions applicable to the city and county of Albany alone, and to no other county of the State, very clearly make for it a local law for the selection, drawing, summoning or impanneling, or both, grand and petit jurors, and unless reported as a bill by the commissioners to amend the statutes, was clearly unconstitutional, because the passage of any such bill by the legislature was strictly forbidden. Was the bill, which is claimed to be a law, a report from the commissioners appointed to revise the statutes? This brings us to the second question which this case involves, and that is: Had the accused the right to show that it had not been so reported?

We have already seen that the court of sessions was powerless to try or to punish the accused for the commission of the alleged crime unless he was properly accused by a legal grand jury through and by the form of an indictment. It is useless to argue that a body of men, no matter of whom composed, has either of its own volition, or upon the summoning and call of other than the authority of the law, to resolve itself into a grand jury, and when professing to be thus organized to accuse anyone, by what it may call an indictment of an infamous crime and subject him to a trial therefor. This proposition is elementary and needs neither argument nor authority to uphold it. If this be sound, as will readily be conceded, it is proper to ask, can a legislative enactment forbidden by the constitution become operative upon the citizen because the court to which objection thereto is made requires extraneous evidence to show the act is within the constitutional prohibition? He who seeks to uphold the judgment rendered in this cause must show that the question

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propounded requires an affirmative answer, and that courts are powerless to determine whether or not an alleged law has been passed despite a constitutional provision forbidding its enactment. The offer upon the trial was so broad and specific as to include every species of evidence attainable upon any such subject as that involved. It included the inspection of the original bill, the journals of both houses, the evidence of the clerk of the senate, of members of the commission, and of individuals; and all was excluded upon the ground that the party, who was then for the first time arraigned, was too late with his objection and his offer of proof in its support. If the act had professed to have been passed because reported by the commissioners, or if the inquiry proposed had impugned the good faith of the legislature by imputing to it some motive or intent other than that evinced by the language of the enactment, the question might be more embarrassing. No proof, however, tending to impeach either legislative declaration or motive was offered. The desire was simply to show that the alleged law, when reported as a bill, did not emanate from the only source possible under the constitution — the commissioners appointed to revise the statutes. So far from attempting any discourtesy to the legislature by an imputation upon its motives or its truth, the offer of evidence was an appeal to its own declaration upon its original bill, and to its own record of its proceedings, which it had itself approved. The offer was rejected, and the decision refusing the production and inspection of "the original act itself" was directly contrary to that of the court of appeals (*People agt. Commissioners of Highways of Marlborough*, 54 N. Y., 276); and the offer of proof by the production of the journals of the two houses was certainly proper (*Purdy agt. The People*, 4 Hill, 384; *De Bow agt. The People*, 1 Denio, 14; *Warner agt. Beers*, 23 Wend., 166, *see note*; *Cooley's Const. Lim.* [4th ed.], 164). It is not necessary, however, to multiply authorities upon what seems to be self-evident. It is clearly the prerogative of the

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court to ascertain and decide whether in the passage of any bill a constitutional provision was violated. This duty and power so clearly devolve upon the court, that the enunciation thereof is sufficient. No case holding to the contrary was cited, and it is believed that none can be found. *In Matter of Elevated Railroad Company* (70 N. Y., 327, 351) nothing opposed to it was decided. The law under consideration in that case was general in its terms — applicable to all elevated railroads in the city and county of New York — and its constitutionality was attacked upon the ground, that it was not what it professed to be, and really was a special statute for the benefit of a particular corporation. It was of such an attempted inquisitorial inquiry into the motives of the legislature in opposition to the words of the law, that judge EARL wrote, when he held that such an inquiry could not be tolerated; but neither he, nor any judge, has ever held that when the constitution requires a bill to be reported through a particular channel to become a valid law, that an inquiry to ascertain such fact could not be made. The application of the principle claimed by the people in this case would nullify the constitution, for then, in spite of its mandate to the contrary, there could be among the statutes of the state an unconstitutional law in fact, but still to be obeyed and enforced in spite of the constitution, because a judicial dictum forbade inquiry as to its origin. In a state, the fundamental law of which confers and limits power, no principle having such a result can be upheld. It, therefore, follows that the rejection of the offers was clearly erroneous, notwithstanding the attempt to sustain such rejection upon a ground not considered by the court below in announcing its decision.

We are now brought to the third question which this case involves. Conceding the unconstitutionality of the act of 1881, under which the so-called grand jury presenting the paper called an indictment was organized, is the defendant without remedy? It is gravely argued and claimed by the

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people that he is. It is said that a body acting as a grand jury, everyone of its members having the personal, qualifications requisite for a grand juror, having presented to the court the paper called an indictment, it became one in fact, to which the prisoner was bound to answer upon the merits, and upon which he could be tried and convicted. Is this sound?

To state such a proposition, it would seem, is to answer it. Why, if it be correct, have any law for selecting, drawing or summoning a grand jury? Why should not the court simply direct the sheriff, or any other officer, to go out and summon such men as he pleases, or why, even, should not the court direct him who to summon, without the cumbersome machinery of a general list of names, the drawing of the persons to serve in the presence of witnesses, and the observance of any of the safeguards of statutes? No one would tolerate or uphold such a procedure, for such orders by the court would not only be without the color of law, but also against its commands; and yet a case depending for support upon a like violation of legal principles is before us. Under and by what authority was the so-called grand jury, which professed to accuse the defendant of an "infamous crime" organized. It was a body of men drawn from a list of names made out and selected by an officer to whose office no such duty belonged, and which names, in defiance of law, if the act of 1881 is unconstitutional, were improperly and unlawfully mingled in one box, from which both grand and petit jurors were drawn. Not only was the recorder of the city of Albany unauthorized to prepare any such list for that purpose, but he was positively forbidden to make it, for no person can undertake to execute the machinery of a statute, which the legislature is forbidden to adopt, without having the constitutional forbidding made applicable to himself. If, then, the alleged indictment of the defendant and his conviction are to be upheld, they must be upon some principle which, in spite of the constitution, shall uphold in the county of Albany for the disposal and trial of this case not only, but of all others, a system for obtaining

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both grand and petit jurors created by a local statute. Is such a proposition maintainable? The claim is that it can be by adjudged cases upon the theory that what an officer does under color of legislative authority will, as to persons affected by it, be upheld. In other words, that the machinery of a supposed law for the obtainment of jurors in the county of Albany shall be kept in operation, though forbidden by the constitution, upon a legal rule, sanctioned by judicial authority, which deprives the constitution of its power and makes inoperative and void one of its most positive commands. Let us see if any court has ever so held.

Preliminary to any detailed examination of the cases to which we have been referred, it is proper to enunciate the principles upon which they all depend, and to show their inapplicability to the one before us. Those principles are: 1st. That mere irregularity by an officer in doing that, which he is authorized to do, will not vitiate the thing done, and, second, when duties properly and legally belonging to the office of which an individual is in possession, have been performed by such incumbent, that which has been thus done will be upheld as to the parties affected thereby, and courts will not, in collateral proceedings, inquire into the right of the individual to hold the office, and to discharge the duties which lawfully appertain to such office.

No such principles are involved in the case before us. It is not urged that any officer has irregularly exercised powers with which he was clothed, but it is claimed that an officer has not only exercised a power unconferred, but also that as such exercise of power was under color of a pretended law, which the constitution of the state declared to be inoperative and void, that which he undertook to do was forbidden by the fundamental law of the state, because, if the enactment of the so-called statute law is forbidden, every act in execution thereof must be equally forbidden. Neither does the accused question the title of the officer (the recorder of the city of Albany) to the office he filled. He admits that such

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officer properly held the official position, under color of which was prepared the pretended jury list, from which the so-called grand jury was drawn. The claim is, that the duty of preparing such list and the right to prepare it did not belong to the office which the recorder held, and, also, that as he undertook to prepare such list in the execution of a supposed law, the enactment of which the constitution forbade, that which he did do was in defiance of the supreme authority of the state—the will of its people embodied and declared in its constitution.

It will readily be seen, if the thread of this opinion has been followed, that the points in this discussion have been correctly stated. In examining, then, the cases cited to sustain the conviction and judgment appealed from, no search will be made to see, if the accused can avail himself of a mere irregularity in the exercise of a power actually conferred upon an officer, nor to learn that he must be remediless if he only questions the discharge of duties properly belonging to an office, upon the ground that its possessor had no legal title, for all this is at once conceded; but we are gravely asked to seek for a solemn opinion, or some judicial dictum upholding as a sound legal proposition, that when an officer performs an act not appertaining to his office, and which, also, he is forbidden to do, such action when injurious to personal rights cannot be questioned, because the officer has assumed to do it, and in fact has done it. This is no strained statement. Even the non-professional mind will recognize its accuracy, and having made it, some of the cases cited will be examined.

In *Friery* agt. *The People* (2 *Keyes*, 424), the challenge was to the array of trial jurors. Such objections (*pages* 433, 434) related to the impartiality of the sheriff who summoned them, and the alleged non-observance of all required forms in the drawing. The court held that these objections were unavoidable; that the provisions of the statutes (*pages* 452, 453) were only "directory to those whose duty it is to select, draw and summon. * * * * The omission to properly

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work the statute machinery by the drawing and summoning officers is a question between the people and those officers."

The brief extracts from the opinion of Judge WRIGHT, just given, show that in Friery's case the officers authorized to draw and summon the jurors had performed that duty, and that the machinery of the law had been worked by the officers charged with that duty. In the case before us, if the act of 1881 be void, that which was done was entirely unauthorized. There was no "machinery" of any law worked, because there was no law making any; there was no list of names prepared from which the selection of so-called jurors was made, for that which is against the fundamental law, is such an absolute nullity that it has no existence as a fact capable of recognition as such by any court. That which is called by those names is improperly so designated. They may have borne the semblance and likeness of the things by which they are named, but an appeal to the fundamental law strips off the mask which gives the appearance of substance and reveals the hollowness of any such pretense.

In *Carpenter agt. The People* (64 N. Y., 483) the point presented was, that one Douglass Taylor, who was the *de jure* commissioner of jurors in and for the city and county of New York, had not selected the grand jury, which indicted the prisoner, but one Thomas Dunlap, who was *de facto* commissioner, had performed that duty. The decision of the court was, that as to the office of commissioner of jurors appertained the right of selecting, such selection was valid because made by an individual holding the office.

In *Dolan agt. The People* (64 N. Y., 485) the same question which arose in the *Carpenter* case was made, with the point added, that among the names upon the list from which the grand jury was obtained were a few which had been improperly placed thereon. The decision of the court upon the first point was similar to that made in the *Carpenter* case; and as to the second, it held among other things (*page* 493) that "no authority can be found holding that in such a case the whole

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list is irregular and void so that none of the persons in it could be drawn for grand jurors, because a few names, without fraud or design, were, as we may assume, by accident or oversight, also put upon it."

In the case before us there was neither "accident or oversight." In the preparation of the list every name was placed upon it by forethought and design, and the whole list is irregular and void, because made without and against the authority of law.

In *Cox agt. The People* (80 *N. Y.*, 500), it was held: "Mere irregularities in the drawing of grand and petit jurors do not furnish a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner;" and that when a challenge to the array of trial jurors had been overruled, because not verified, an offer by the court, subsequently made, to receive evidence in support of such challenge, and its declination by the prisoner, precluded him "from insisting upon the exception to the ruling," and that he "must be regarded as having abandoned his challenge."

It is impossible, however, to examine in detail every case to which we have been referred. If the distinction herein before stated, between the right to inquire collaterally into the title of an incumbent of an office, and the right to question acts, which do not appertain to the office under color of which they are done, is remembered, none presents any difficulty. An individual may possess an office by an unconstitutional law, but if he only performs the acts, which the office may do, such acts, when done, are valid, because he is a *de facto* officer. When, however, an individual holding an office, either *de facto* or *de jure*, or both, does an act which his office does not authorize to be done, that action cannot be sustained. A man, for example, in possession of an office of a justice of the peace, though not its rightful incumbent, may render, in a case within the jurisdiction of a justice of the peace, a judgment valid between the parties thereto, but he cannot, even

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by consent, render a valid judgment in an action which the office is forbidden to hear. He who is in possession of the office of recorder of the city of Albany may do every act appertaining to that office, but he cannot exceed the powers conferred by law upon the office, and to this proposition it is scarcely necessary to add the statement, that power attempted to be conferred by an unconstitutional statute is as much unconferred as if the attempt to confer it had not been made. The power and authority of an office must be conferred by valid laws and there is no legal principle which justifies the assumption of power upon the ground that it has been assumed. The adoption of such a rule would be utterly subversive of personal rights and place every one at the mercy of an official who chose to exercise power beyond that which had been conferred. Let us see the result of its adoption in this case. The point has already been alluded to in the general course of argument, but a more full reference thereto is justified by its importance.

That the constitution of the state has positively forbidden the enactment of a local law operative in and applicable to the county of Albany only, for selecting, drawing, summoning or impanneling grand or petit jurors," unless as a bill it was reported to the legislature by "commissioners who have been appointed pursuant to law to revise the statutes," will be conceded. That the section of the constitution thus forbidding such enactment was intended to be operative is known from its language, and the reason for its adoption are shown by the report of the committee (Messrs. Brooks, Kernan, Howland and Tracy) which reported it to the constitutional commission. It was designed to secure uniformity in the administration of justice throughout the State, and to prevent the passage of a local bill, which might be aimed at its corruption. The origin of the act is also as a fact too well known to suggest any doubt as to its source, or an intimation even that it was reported from the commission to revise the statutes. If, then, the act of 1881, though within the con-

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stitutional forbidding, is still to be upheld, not only for the present case, but for all others arising within the county of Albany, upon any of the theories upon which it has been sought to be maintained (other than those upholding its constitutionality), what becomes of the constitutional provision? Instead of being operative, it has become a dead letter — instead of being observed and kept, it has become of no account — instead of the constitution being the superior of the courts which it has created, judges composing them have become its superiors, and by the adoption of legal rules have made laws higher than the constitution. To no such doctrine should any judicial sanction be given, and though in this case the supposed law may have worked no individual injustice, and may never in any, it is impossible to sustain what has been done thereunder upon any such ground. That which the constitution declares shall not be done, when done, can never be upheld, even though mere abstract justice has been accomplished. The act is against public policy, subversive of government, and therefore never to be sanctioned, but should be promptly pronounced inoperative and void by judicial decision.

The proceedings down to the time of the impanneling of the alleged trial jury have now been examined, and such examination leads me irresistibly to the conclusion that the court of sessions erred in overruling the objections taken to the alleged indictment, and in excluding the evidence in support thereof. The same questions were again made upon the impanneling of the trial jury, and the rulings were also the same. These it will be unnecessary to examine, as the reasoning already given is applicable, and the last point made — that none of the questions which have been considered are presented by the appeal — will now be considered.

It is insisted that section 517 of the Criminal Code only brings before the court for review such matters as by section 485 form a part of the judgment-roll. Grant this, and what follows? By section 485 "the bill of exceptions, if there be

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one," forms a part of such roll, and as one was made and forms a part of the roll, in this case, which shows that the proceedings and decisions hereinbefore detailed were had and made, we have all before us. It is absolutely impossible to separate the arraignment and proceedings thereon from the trial, for they were a part thereof as completely as that which transpired after the trial jury was impaneled. The arraignment, the objections to the alleged indictment, the offer of proof to sustain them, the plea to the merits, and all that then occurred, followed consecutively upon the same day, and all formed a part of one trial, the history of which we have before us, and no one exception then taken is more completely before us than any other. Section 485 of the Code speaks of no exceptions, apart from "the bill of exceptions, if there be one," being contained in the roll of judgment. It does, it is true, enumerate copies of certain papers as also forming a part of such roll, but as to all exceptions which come before the court on appeal, they must be contained in the bill of exceptions. Neither is it true that section 455 prevents exceptions of this character from forming a part of this bill. That section expressly provides that an exception "in the trial of an indictment * * may be taken by the defendant, to a decision of the court * * in deciding any question of law" provided the "substantial rights" of the defendant are thereby "prejudiced." It is, it seems to me, a contracted view of statutes and personal rights, which thus seeks to hamper this appeal. The ruling of the court below involved one of the most sacred rights of a man — his right to be tried for a crime only when indicted by a grand jury organized according to law. When this prerequisite to a trial, and conviction was not obtained, and a human being is in prison without this safeguard of his rights having been observed, this court should rather stretch than curtail its power to review.

It remains for me simply to enunciate in conclusion my opinion that the judgment appealed from should be reversed. It would be more pleasant to agree with associates whose

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learning and integrity I respect, than to differ from them, but a most careful study of the questions involved in the maintainability of the jury law of Albany county, not only in this case, but in others argued at its court of oyer and terminer, leads me irresistibly to the conclusion that chapter 532 of the Laws of 1881, by which the jury system for that county purports to be created is unconstitutional and therefore void.

N. Y. MARINE COURT.

GEORGE SCHLEGEL agt. THE AMERICAN BEER AND ALE
BOTTLING COMPANY.

Code of Civil Procedure, section 1778—Time in which order of judge directing issues presented by the pleadings to be tried, &c., as provided by this section must be served—Practice in marine court.

In a suit against a domestic corporation, brought in the marine court, the time in which an order, under section 1778 of the Code of Civil Procedure, must be served, is limited to six instead of twenty days.

Special Term, November, 1882.

HAWES, J.—This action is brought upon a promissory note made by the defendant, a domestic corporation.

The summons was served on October 12, 1882, and no order of the judge directing the issues presented by the pleadings to be tried, in compliance with section 1778 of the Code was served with the answer, nor was any such order obtained or filed. On the nineteenth plaintiff entered judgment, on the ground of the failure to serve such an order.

The motion is now made to vacate the judgment, upon the theory that the right to enter judgment was not complete until the expiration of twenty days after service of the complaint.

The question has not arisen before in this court, and its

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decision is therefore of some importance as determining the practice.

It is a well settled rule of interpretation that words which are not ambiguous shall be interpreted literally, and full effect shall be given them by the court; and in that phase of the case it is clear that the court would have no power to order the entry of judgment until after the lapse of twenty days from service of the complaint, as the language in that regard is clear and explicit. But the very section which embodies this provision also declares that "in such an action, unless the defendant serves, with a copy of his answer, a copy of an order of a judge," &c., plaintiff may take judgment as in case of default in pleading.

The Code provides that answers in this court shall be due in six days instead of twenty, and all notices and orders are made to conform to this general principle so far as the practice here is concerned.

The court is therefore called upon to determine the intent of the legislature in this enactment.

As is said by chancellor WALWORTH, in *Donaldson agt. Wood* (22 *Wendell*, 397), the court must consider the "necessity and probable object of the change, and then give such construction to the language used by the lawmakers in providing the remedy as to carry their intention into effect so far as it can be ascertained from the terms of the statute itself;" and this construction must be such as is warranted by the words of the act. The further principle of interpretation must be considered, viz., that all statutes in *pari materia* must be construed together.

With these principles in mind, it seems clear that the legislature intended that the order of the judge should be served within the time when the answer was due, and when the statute provides that the answer should be due in six days, that the order should be served within that time, and it seems unnecessary to discuss the reasonableness of such a construction, for it is fairly inferable from the section itself, as well as

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from the general intent and purpose of the provision. This section took the place of 2 Revised Statutes, 458 (*chap. 8, title 4, art. 5, sec. 8*), which authorized the plaintiff in an action against a corporation, founded on a note or other evidence of debt, to apply to the court for judgment on the return day, and the court then rendered judgment in favor of plaintiff, unless it was made to appear that the corporation had a good and substantial defense on the merits. It is clear, therefore, that the return day under the old practice was the essential element of time, and the counsel is bound to construe the present provision in the light of the former legislation and the former practice.

The present practice only modifies the former by making it conform to the Code practice and compels the corporation to establish a *prima facie* case of merits on or before the return day, whenever that may be. "When the object of the legislature is plain and unequivocal courts ought, without violence to the words, to adopt such a construction as will but effectuate the intentions of the lawgivers." I have no doubt that the construction given to this statute by the plaintiff was the just and proper one, and that the time in which the order of the judge must be served is limited in this court to six instead of twenty days.

Motion denied, with costs.

U. S. CIRCUIT COURT.

WALDMAN agt. PENNSYLVANIA RAILROAD COMPANY.

Calendar practice on removal of cause from state to United States circuit court.

Where a case is removed into the United States circuit court after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein.

November, 1882.

Harry agt. Hilton.

THIS action was begun in the marine court of the city of New York. On May 29, 1882, the defendant served its answer, whereupon plaintiff filed a note of issue, and on June 7, 1882, noticed the case for trial for June thirteenth. On June twenty-third the defendant filed a petition and bond for removal into this court, and a removal was on that day duly had. The defendant filed the record on the first day of the present term of this court (October sixteenth), and it appears that the plaintiff had previously put the case upon the calendar of this court and again noticed it for trial.

The defendant moved to strike the cause from the calendar as improperly on, for the reason that the clerk could not put it upon the calendar, and plaintiff could not notice it for trial in this court until after the record had been filed. The plaintiff, in opposition, claimed that the cause standing "for trial" before removal, his practice had been regular, and cited section 6, act of 1875, and *Koontz agt. Railroad Company* (14 *Otto*, 13-18).

R. Leimisor, for plaintiff.

Robinson, Scribner & Bright, for defendant.

SHIPMAN, J. — Under the rules of the circuit court, I think that this case is now in a condition to be assigned for trial at any time at the present term.

N. Y. COMMON PLEAS.

ELLIOT C. HARRY agt. EDWARD G. HILTON, impleaded, &c.

Attorney and client — Client responsible for stenographer's fees when stenographer is employed by attorneys.

A client is responsible for stenographer's fees in proceedings in a case where such stenographer is employed by attorneys to take the minutes.

General Term, November, 1882.

Harry agt. Hilton.

Frank F. Slade, for plaintiff and respondent.

Charles W. Seymour, for defendant and appellant.

VAN BRUNT, J.—The question involved in this appeal is, whether a client is responsible for stenographer's fees in a case where such stenographer is employed by attorneys to take the minutes of the proceedings before an auditor, to whom the surrogate has referred an executor's account. The counsel for the respondent relies upon the decisions of the courts which held that when an attorney orders notes of a case from a stenographer that the client is presumably liable and not the attorney, because the relation of principal and agents exists.

These cases introduce no new rule in the law regarding contracts, but simply enforce an old one. Their significance, however, lies in the fact that in the decision of these cases, the courts assume that such action upon the part of the attorney is presumably within the scope of the authority conferred upon him, when he is retained by his client, and that the attorney has the right to bind his client for any service which may be necessary and proper not only for the preparation of the case for trial, but for the convenient conduct of such trial, and the proceedings thereafter taken (*Covel agt. Hart*, 14 Hun, 254).

In the case of the *First National Bank agt. Tomajo* (77 N. Y., 476) the right of the attorney to make agreements which enhance the burden and costs of litigation is directly recognized.

We are of the opinion, therefore, that the attorney does bind a client for the payment of stenographer's fees where he is employed during the progress of a proceeding under a suggestion to which he accedes.

The objection raised to the ruling of the court in excluding the question as to whether the defendant Hilton instituted the proceedings or filed objections to the account is not well taken. The fact that Hilton was attending such accounting

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by his counsel was conceded. He was attending such accounting by his attorney as a party in interest. He thereby became a party to the proceeding, and it was immaterial whether he instituted it or not.

The judgment should be affirmed.

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN SANDERSON agt. THE BOARD OF
CANVASSERS OF GREEN COUNTY.

Election Law — Duties of inspectors — When mandamus will issue to the board of county canvassers requiring them to remit to the inspectors a return made by them of the result of an election, for correction.

The statutes of the state require the inspectors of election in their return to make a true statement of the result of the election held in their district, and until they have so done, their duty under the law remains undischarged.

If what purports to be a return has been made, which either by mistake or design is inaccurate and erroneous, they have not by making such erroneous statement and return discharged their duty under the law, and therefore as their duty is undischarged, they have not become *functus officio*.

Only when they have complied with the statute, by making an accurate and true return of the votes cast for a particular office and the votes cast for each candidate for the office, has their duty under the law been discharged.

Although a court should be careful not to needlessly cause a return to be sent back to the inspectors of an election district for correction, yet it should do so, whenever the facts and circumstances proved to the satisfaction of the tribunal show that a mistake has in fact been made.

Greene Special Term, December, 1882.

APPLICATION for a peremptory *mandamus*.

J. I. & F. Werner and *J. B. Olney*, for the relator.

J. A. Griswold and *G. Howard Jones*, for the board of county canvassers.

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WESTBROOK, J.— This is an application for a peremptory *mandamus*, requiring the board of county canvassers to return to the inspectors of the first election district of the town of Hunter, county of Greene, the return made by such inspectors to the board of the result of the election held in November last for correction. The ground of the application is, that the return which was made by such inspectors is incorrect and inaccurate, and that a mistake was made in such return in regard to the votes cast in such district for the office of county judge of the county of Greene. It will not be necessary in disposing of this application to discuss with any degree of nicety all the contested facts which are presented upon this motion, and no attempt so to do will be made. It will be sufficient to state the prominent, and uncontested facts, and in connection therewith to consider the law applicable thereto.

By the return made to the board of county canvassers by the inspectors of election, Manly B. Mattice is therein stated to have received one hundred and seventy (170) votes for the office of county judge of the county; and the relator, John Sanderson, is therein stated to have received ninety-two (92) votes; and no votes whatever are therein declared to have been given for any other person for that office. Among the affidavits submitted on the part of the relator for the purpose of showing that such return is inaccurate and erroneous are those of Homer H. Payne, one of the inspectors of the election in such district; of Alvin S. Haines, another of such inspectors; and the affidavit of the relator, John Sanderson; the last-named individual, however, testifying not to facts within his own knowledge, but to information which he received from the third inspector, William O'Hara, and others. From such affidavits it appears that Manly B. Mattice received in such election district either one hundred and forty-nine (149) or one hundred and fifty (150) votes, and not one hundred and seventy (170) as contained in the return; and that John Sanderson received one hundred and eight

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(108) votes at such district poll, and not ninety-two (92) as has been returned to the board of canvassers. In addition to this there were several votes cast for Eugene Raymond, who was also a candidate for the office of county judge at such election, which votes have not been returned nor stated in the result of the canvass as made to the county canvassers.

In opposition to this motion, among other affidavits presented by the board of county canvassers, is the affidavit of Homer H. Payne the inspector who made an affidavit for the relator, and that of Michael O'Hara, who was one of the clerks of the board in the district. Whilst the former gentleman undertakes to take back in part his previous sworn statement, yet it is apparant from reading over such affidavit, that he does not substantially contradict or vary the evidence contained in his previous affidavit; nor do either of the affidavits satisfy me that there has been a correct and accurate return made to the board of county canvassers of the votes cast in such district. It is not important in considering the present application to determine how great the errors are which are contained in the return as made; nor is it all important to consider whether they are sufficient or not to change the result of the election. A careful examination of the affidavits satisfies me that there is reasonable ground to believe that the return as made from the first district of Hunter is not accurate and the question therefore is: Shall this *mandamus* be granted, not for the purpose of declaring what errors exist and what corrections shall be made, but for the purpose of enabling the board of inspectors, who by their affidavits profess their willingness to reassemble and meet, so to meet and assemble that they may determine for themselves what is the just and true vote cast in such district for the office of county judge, and thus fulfill their duty under the law.

The statutes of the state require the inspectors of election in their return to make a true statement of the result of the election held in their district, and until they have so done, their duty under the law remains undischarged. If what pur-

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ports to be a return has been made, which either by mistake or design is inaccurate and erroneous, they have not by making such erroneous statement and return discharged their duty under the law, and therefore as their duty is undischarged, they have not become *functus officio*. Only when they have complied with the statute, by making an accurate and true return of the votes cast for a particular office and the votes cast for each candidate for the office, has their duty under the law been discharged. If no return had been made, it would scarcely be doubted by anyone that even at this comparatively late period of time that a return could be compelled; and if a return could be compelled, when none had been made, it is equally clear that when one has been made which is erroneous and mistaken, that a true and accurate return can be required. The failure to make a return at all is no greater violation of the law than the making of an inaccurate and a false return. It is true that a court should be careful not to needlessly cause a return to be sent back to the inspectors of an election district for correction, but it should do so whenever the facts and circumstances proved to the satisfaction of the tribunal show that a mistake has in fact been made. That such a case is presented upon the papers used upon this motion seems clear, and without any detailed statement of the errors which have been made to appear, it is sufficient to say that upon all the evidence submitted, as well upon the part of the relator as upon the part of the board of county canvassers, there has not been made to the board of county canvassers a return of the result of the election district which is accurate and exact in every particular. Not only does such return fail accurately to state the votes cast for Matice and for Sanderson, but it also fails to state the votes which were cast for Raymond. From all the proofs submitted it is clear that votes for Raymond must have been cast. It is no answer to this statement to say that a return upon that point is unnecessary, because it cannot change or alter the result. Whether the result is

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altered or not the law is uncomplied with, for that requires a correct statement of the votes cast for each and every candidate for the office, which confessedly has not been done. There is therefore, so far as I can see, no reason why such return should not be sent back to the board of inspectors for correction in those respects and particulars in which it is erroneous, defective, or not sufficiently full.

It is argued, however, by the board of county canvassers, in opposition to this motion, that no practical result can be attained by sending the return back for correction, because the canvass for the office of county judge was completed at the time the notice of this motion was served and a certificate granted to Manly B. Matice, who has already qualified for the office of county judge. It would be important to consider this position, if the question was now before the court as to the result and effect of the alleged canvass — the granting of the certificate and the qualification of the officer. But that question is not before me. No opinion is expressed upon the effect of an amended return, even though when amended it should be in accordance with the facts as claimed by the relator. The court is not now dealing with the question of the ultimate result, but only with the duty of the inspectors of election. It being clear from the papers that the return from such election district is erroneous, and thus that the law has not been complied with by such inspectors, it follows that the return must be sent back to such inspectors for correction.

For the reasons which have been stated, a *mandamus* must issue to the board of county canvassers requiring them to remit and to return to the board of inspectors of the first election district of the town of Hunter the return for such correction as they may see fit to make.

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SUPREME COURT.

C. COLES DUSENBURY agt. THE MUTUAL UNION TELEGRAPH COMPANY.

Telegraph companies — No right to set their poles in front of persons' lands or residence without making compensation therefor — An action may be maintained for their removal — Ejectment.

An action of ejectment may be maintained by the owner of lands against a telegraph company for the removal of poles which have been set by such company on the side of the road in front of the plaintiff's lands and residence without first having made compensation.

Under the act of 1858 (*Laws of 1858, chap. 411*), amending the act of 1848, providing for the incorporation and regulation of telegraph companies, such companies cannot enter upon and use lands (which includes public roads, streets and highways) without first compensating the owner or owners thereof. It must make payment precede appropriation.

Special Term, December, 1882.

DYKMAN, J.—The defendant in this action has set telegraph poles on the side of the road in front of the plaintiff's lands and residence, in the village of White Plains, without making compensation, and this action is for their removal. It is undisputed that the plaintiff owns the lands thus occupied, subject only to the highway easement, which between him and the defendant, leaves his ownership complete and exclusive. Nor is it contended that ejectment is an improper remedy to rid the highway of extra burdens wrongfully imposed.

The defense is, that there is a statute of this state authorizing such occupation as defendant has made, and that the plaintiff is, by the terms of such statute, limited to one single remedy. The defendant urges that it is authorized to occupy the highway in question without compensating the fee owner, and that the latter must set in motion the judicial machinery provided to measure the compensation to be made and await its slow motion.

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Careful study of principle and authority will show that, under the constitution of this state, no such right as the defendant claims could be given it, and that the statute invoked does not attempt to confer any such authority.

There are two great classes of corporations, public and private. Public corporations are created for purposes of government, and as applied to corporations the term public is synonymous with municipal. Private corporations are created for commercial purposes. They are sometimes made agents of the state, and by inconsiderate talking and writing they are sometimes called public, but their nature remains the same; they are trading corporations.

It is too late to question the power of the state itself to appropriate the property of its citizens for public purposes and defer payment, and the principle has been extended to corporations created for purposes of local government. But the reason of the exercise of power is the undoubted responsibility of the state and municipality to compensate the owner.

The gulf between governmental corporations and commercial companies is nowhere wider than at the question of eminent domain, and the gulf is not bridged by the courts clothing the latter with a public character to enable them to exercise the right of eminent domain.

The text writers agree that these private companies ought to be required to pay before they appropriate. Mr. Cooley, in his *Constitutional Limitations* (*page 702*), says: "Where, however, the property is not taken by the state or by a municipality, but by a private corporation which, though for this purpose to be regarded as a public agent, appropriates it for the benefit and profit of its members, and which may or may not be sufficiently responsible to make secure and certain the payment in all cases of the compensation which shall be assessed, it is certainly proper, and it has sometimes been questioned whether it was not absolutely essential that payment be actually made before the owner could be divested of his freehold." Chancellor KENT (2 *Com.*, 339) has expressed

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the opinion that compensation and appropriation should be concurrent. The settled and fundamental doctrine is that government has no right to take private property for public purposes without giving just compensation, and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time, with the actual exercises of the right of eminent domain.

While this is not an inflexible rule, unless in terms established by the constitution, it is yet so just and reasonable that statutory provisions for taking private property very generally makes payment precede or accompany the appropriation, and by several of the state constitutions this is expressly required. On general principles it is essential that a fund be provided, which the owner of the property can certainly obtain. It is not competent to deprive him of his property and turn him over to an action at law against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy." The contrary construction shocks the sense of natural justice, and a party against whom it is urged has a right to demand that the position be abundantly fortified by authority. The defendant here presents but one isolated authority, and that fails to meet this case.

In *Calkin agt. Baldwin* (4 *Wend.*, 688) an act was construed which permitted the defendant to improve the navigation of a public river, declared to be a public highway. The provision for compensation was very like that of the act under consideration. So far as the case goes it makes for the defendant; but there is a distinction between improving a highway, the sole use of which is public, and stretching wire over it for a private company. They are not parallel cases. Every other case cited by the defendant was that of a governmental corporation taking lands, and as we have seen it does not follow that because such public corporations may take possession before payment that a private corporation may do the same.

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Bloodgood agt. The Mohawk and Hudson Company (18 Wend., 1) is often quoted as authority for the defendant's contention, and is relied on now.

The action was trespass, *quare clausum fregit*. The defendant justified under its act of incorporation. That act gave it authority to take possession of and use all such lands and real estate as should be indispensable * * * provided compensation be made. The supreme court gave judgment for the defendant, but the court of errors reversed the judgment and held that compensation under the defendant's charter was a condition precedent to the right of entry.

Chancellor WALWORTH, writing for reversal, concludes as follows: "The conclusion at which I have arrived, therefore, is that the defendants' plea is imperfect in not averring that the damages had been regularly assessed and paid before defendant entered upon the plaintiff's land and appropriated it to the use of their road."

The conclusion of senator EDWARDS is still stronger against the assumed right.

Senator MAISON said: "When the compensation is to be made may perhaps be a matter of doubt, whether before the property is taken and used or afterwards; it must either be paid before the property is taken or within a reasonable time thereafter, and the making of this compensation must be as absolutely certain as that the property is taken; it must not be dependent on any hazard, casualty or contingency, whatever. The language of the constitution is explicit and unambiguous. 'Probate property *shall not be taken* for public use without just compensation. * * * Compensation, according to my understanding, is to be made before the property be taken, or indulging in great liberality of construction, the property may be taken on there being an ample and absolute provision made for positive, certain payment, without subjecting the citizen to hazard, contingency, litigation or imploration. * * * As, however, no certain payment at a future day is provided, we must construe this law,

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in order to sustain its constitutionality, as suggested. The payment must precede the use.' ”

Senator TRACY, concurring with the chancellor and senators EDWARDS and MASON, concludes in a very able and interesting opinion, as follows: “I conclude, therefore, that in the present case, where there was no public fund, which in law and in fact must be deemed always adequate to insure the payment of such damages as shall be found to have accrued, that the legislature could not authorize the defendants to enter upon and possess and use the lands belonging to the plaintiff until they had first paid or offered to pay him a just compensation therefor.” A resolution passed the court embodying the views expressed in these quotations, and judgment was entered against the company.

The legislature, at its last session, provided for elevated railroads taking possession before making compensation, but it provided, also, for the ascertainment, deposit and final distribution of an indemnity fund. (*Laws of 1882, chap. 393.*)

The acts under which the defendant justifies contains no provision for an indemnity fund, and leaves compensation contingent upon the defendant's financial solvency; and that failing, the land owner must, to rid himself of these poles and wires, have the vexation and expense of a law suit.

The act of 1853 so amended the law of 1848 as to resolve any doubts that might be entertained as to the legislative purpose. The act of 1848 made payment a condition subsequent, and did not provide a fund from which to compensate the land owner. Therefore, within the principle of *Bloodgood's case*, it was unconstitutional. The act of 1853 amends it. The right to enter upon and use lands is declared to be subject to the fee owner's right to compensation, and either party is authorized to institute the proceedings.

The condition is contained in the words, “subject to the right of the owner or owners thereof to full compensation for the same (*Laws of 1853, chap. 471, sec. 2*). It is to be construed as follows: First. It is a condition precedent.

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Second. It applies to the public roads, streets and highways," and also to "any other land which the company is authorized to occupy."

Other reasons for this construction are, that since no provision is made for an indemnity fund, the law must else be held unconstitutional under Bloodgood's case, which would work great injury to the telegraph companies, and by it private rights are amply protected, as they must be under a constitutional government.

My conclusion is, that the defendant must make payment precede appropriation, and it is reached in full view of all the consequences. It is known that the electric telegraph is the channel for the transaction of the commercial business of the world. By it space is annihilated and time reduced, modes of business are revolutionized and simplified. It has become the messenger of thought and the medium of communication. It has interlinked states and nations; and millions of capital have effected its construction and extension, and if these views become prevalent they may be embarrassing to these large and useful companies.

Yet the courts cannot turn aside nor close their portals. Constituted for the administration of justice to all alike, before them individuals and corporations are all equal. The voice of the weak and the powerful must impress the judicial ear the same, and all must receive even handed justice.

The plaintiff must have judgment.

Selchow *et al.* agt. Baker *et al.*

N. Y. COMMON PLEAS.

ELISHW G. SELCHOW *et al.* agt. JAMES S. BAKER *et al.*

Trade-mark — Arbitrary fancy names subject of — Injunction.

Plaintiffs invented a name for certain puzzles or games and applied thereto the names of "sliced animals," "sliced birds," and "sliced objects:"

Held, upon motion to continue injunction, that these names were arbitrary fancy names and the proper subject of a trade-mark.

Special Term, October, 1882.

MOTION for injunction.

Malcolm R. Lawrence, for motion.

Blatchford, Seward, Griswold & Da Costa, opposed.

J. F. DALY, J. — The plaintiffs are inventors of certain games or puzzles for children to which they have given the name "sliced animals," "sliced birds," and "sliced objects," according to the pictures used in the play. The puzzles are constructed as follows: strips of card-board, six and three-quarter inches long by an inch and a quarter wide, have a portion of the picture of an animal, a bird, or any object, printed on them, with a single letter of the name of the thing represented in the left hand corner of the strip. The puzzle is to find the strips containing the other portions of the picture and the other letters of the name, and to place such strips above or below each other so that the whole picture and the whole name are formed. The plaintiffs manufacture the picture strips as follows: the whole picture and the names are printed in colors on a single sheet of card-board, which is then cut into strips of the sizes above mentioned.

I am satisfied that the names given by plaintiffs to these games, viz.: "Sliced animals," "sliced birds," and "sliced objects," must be considered fanciful and arbitrary designa-

Young *et al.* agt. Boyd.

tions which do not describe the thing manufactured nor its character. They convey no correct idea whatever of the game, or the things used in it or the process by which it is manufactured.

The true designation of the thing and of the game is "divided picture cards," and no other description will convey even a faint idea of them. Neither the card nor the picture on it is sliced, as the term is commonly and properly understood. The name "sliced animals" conveys no intimation that the pictures of animals printed on cards have been cut in strips, and does not truly or in any manner describe the character, game or puzzle. A significant fact in support of this view is that, as appears by defendants' own affidavits, games and puzzles made of divided boards or blocks, on which maps, pictures, words, &c., were printed, have been manufactured and sold for over twenty years past under the names of "dissected maps," "spelling games" and under other names; but in no instance has the name "sliced" been applied until plaintiffs chose it to distinguish their articles. If the name were the natural and proper designation of the goods it would have been naturally applied to them long before.

Motion for injunction granted so far as the use of the names complained of is concerned, with ten dollars costs.

SUPREME COURT.

JAMES YOUNG *et al.*, executors, &c., of WILLIAM BOYD, deceased, agt. ISABELLA BOYD and others.

Will — *When widow cannot take both dower and a provision made for her by the will of her husband* — *When widow to make election.*

Where a specific provision by the testator in his will, for his wife, inconsistent with a right in the widow to demand a third of the land to be set off to her, she must make her election, though the testator does not in terms declare that such provision is to be taken by her in lieu of dower.

Young *et al.* agt. Boyd.

Where the testator by his will clothed his executors with a power of sale of all his estate, real and personal, in such form as to work an equitable conversion of the realty into personalty, and vest them with the title to all the property, the income of a portion of the proceeds of the estate when sold to be paid to the widow for life, the remainder of the proceeds being absolutely disposed of, the widow cannot take both dower and the provision made for her by the will, the claim of the one being inconsistent with and repugnant to the other.

Special Term, December, 1882.

Bartlett & Wilson, for plaintiff.

Jehiel G. Hurd, for defendant Wilson.

Roscoe H. Channing, for defendant Isabella Boyd.

VAN VORST, J. — The question to be determined in this action is, whether the defendant Isabella Boyd, the widow of the testator, can claim dower in the real estate of her husband, as well as the specific provision made in her favor by her husband's will.

The will does not in terms declare that what the husband specifically gives to his wife is to be taken by her in lieu of dower, nor was it necessary to have been so explicitly stated, if the will discloses a clear intention on the husband's part that his widow should not take the provision made for her in the will in addition to dower.

And if the provision expressly made for her by her husband's will is wholly inconsistent with a right in the widow to demand a third of the land to be set off to her, she would be put to her election.

As dower is a legal right, such result could only be reached through a necessary implication clearly arising from the terms of the will, and the disposition thereby made. There can be no question as to the general rule upon this subject, but its application to the facts of particular cases has heretofore given occasion to apparent conflict.

This question is discussed in *Adsit agt. Adsit* (2 Johns.

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Ch. R., 448), *Sanford* agt. *Jackson* (10 *Paige*, 286), *Gibson* agt. *Gibson* (17 *L. & Eq.*, 349) and *Ellis* agt. *Lewis* (3 *Hara*, 313) to which others might be added as more or less sustaining the view urged by the learned counsel for the widow.

But, upon consideration, I must hold that the cases of *Savage* agt. *Burnham* (17 *N. Y.*, 561) and *Gibson* agt. *Ketchum* (32 *N. Y.*, 319) are placed upon grounds which must dispose of this case adversely to the widow's claim to the provision of the will in addition to dower.

The executors are clothed by the second clause of the will with a power of sale of all the testator's estate, real and personal. This power is placed in such form, and is accompanied with such duties, as to work an equitable conversion of the realty into personalty, at the death of the testator, which it would be difficult to accomplish fully according to the general scope of the will, in the face of a claim insisted upon by the widow, that a portion of the real property shall be set apart for her dower right.

But such difficulty might not in itself prove to be wholly insurmountable, nor be regarded as inconsistent with such claim (*Wood* agt. *Wood*, 5 *Paige*, 596).

But the executors are, in legal effect, invested with the title to all the property. They are directed, until the property is sold in pursuance of the direction of the will, to pay to the widow of the testator, from the rents and incomes of the estate, the sum of fifteen hundred dollars per annum; but if such rents and incomes prove less than that amount, after paying taxes and assessments, the full amount of the income of the estate, after paying such taxes and assessments, is directed to be paid by the executors to her, for her support, and that of the testator's infant son William.

The direction to pay over the rents and profits involves a power to collect and receive, and under the case of *Gibson* agt. *Ketchum* (32 *N. Y.*, 319) such power over the real estate, and its rents and profits, invests the executors, as trustees, with the legal title; and such facts in connection with the

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other fact, that the testator had fully disposed of all the proceeds realized upon the sale, after making a specific provision thereout for his widow, under the cases of *Savage* agt. *Burnham*, and *Gibbons* agt. *Ketchum*, renders the widow's claim of dower inconsistent with and repugnant to the provisions of the will. By these dispositions of the will the testator directs that one-third of these proceeds shall be invested by the executors, and be held by them for the benefit of his widow for life, to whom the income thereof is directed to be paid for life.

The remainder of the proceeds are otherwise absolutely disposed of by the testator.

The conclusion reached, therefore, is that the widow must make her election, as she cannot take both dower and the provision made for her by the will.

SUPREME COURT.

In the Matter of the Application of the NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY to acquire title to certain real estate of WILLIAM H. WATSON.

Railroads—Proceedings to acquire title to real estate—Practice in such proceedings.

In proceedings to acquire title to real estate under chapter 140 of Laws of 1850, where the petition stated that the company "is a corporation organized under and in pursuance of the laws of the states of New York and New Jersey for the purpose of constructing," &c., and then goes on to state how and under what laws it is organized:

Held, that this is a sufficient compliance with the statute which requires the petition to state, in effect, that the company is duly incorporated.

The act (*Laws of 1869, chap. 917*) authorizing consolidation gave the successor all the rights of every description belonging to the predecessor, and consequently an allegation in the petition that one of the predecessors (naming it) of this company made and filed the proper map, &c., is a sufficient compliance with the statute.

It is not necessary to give in the petition a history of the negotiations, or

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to state the evidence from which is derived the fact of inability to to agree by reason of an excessive price being asked. When the reason stated is in substance that the price asked by the owners is excessive, it is sufficient.

An objection that a second application should not be granted without special cause shown therefor, is not a preliminary objection. This is a matter to be raised and disposed of at the trial.

The statute does not require separate petitions for lands needed for the route, and for lands needed for operating the road, nor to postpone the application for the latter until the former is obtained.

Whether or not, under the amendment of 1876, the company must tender the amount of the former award before renewing the proceeding, is a question to be determined at the trial.

Oneida Special Term, October, 1882.

E. W. Kernan and C. J. Everett, for petitioner.

E. J. Richardson and George W. Adams, for claimant.

MERWIN, J.—The statute upon which this proceeding is based requires that the petition of the company shall state certain things, and that upon its presentment to the court any party in interest may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it, and that the court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown shall appoint commissioners to ascertain and appraise the compensation to be made. If the petition does not state the facts required by the statute to be stated, an objection in that regard can be raised preliminarily in effect, by way of demurrer, and should be disposed of before proceeding to the merits. If such objection is well taken, the proceeding is dismissed, unless a proper case for amendment is shown. If such objection is overruled, then any defense to the proceeding, by way of denial of facts in the petition, or new matter outside, may be set up by affidavit or answer, and the issues so formed are to be tried.

In the present case, whatever objections are made to the petition upon its face are to be now determined. But what-

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ever objections are raised by denial of facts in the petition or by new matter set up, must be disposed of at the trial hereafter.

1. It is objected that the petition does not state "that the company is duly incorporated." It in fact states that the company "is a corporation duly organized under and in pursuance of the laws of the states of New York and New Jersey, for the purpose of constructing," &c., and then goes on to state how and under what laws it is organized. The statute is, that the petition must state in effect that the company is duly incorporated. I think it does so state.

2. It is objected that the petition does not state that this company has surveyed the line and made and filed the proper map, &c. The allegation in the petition is, that one of the predecessors (naming it) of this company made and filed such map.

The act authorizing consolidation gave the successor all the rights of every description belonging to the predecessor (*See chap. 917 of 1869*). This obviates the present objection.

3. It is objected that the petition does not state sufficiently the reason of the inability of the company to acquire the title. The reason stated is in substance that the price asked by the owners is excessive. That is recognized as a good reason in *Matter of P. P. and C. I. R. R. Co.* (67 N. Y., 371) and in *Matter of March* (71 N. Y., 315). It is not necessary to give in the petition a history of the negotiations or to state the evidence from which is derived the fact of inability to agree by reason of an excessive price being asked.

4. It is objected that a second application should not be granted without special cause shown therefor. This is not a preliminary objection; it does not arise on the face of the petition; the facts on which it is based are not before me. It is a matter to be raised and disposed of at the trial.

5. It is objected that the company must first acquire the lands for its route and included in its survey before acquiring any for any other purpose, and that one petition should not include lands for both purposes, for the reason as alleged,

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that a different title is acquired for land for the route and for land for building, and that at least the present petition is defective in not stating what part is desired for the route and what part for buildings. The statute does not seem to recognize the distinction made in this objection. It provides (*sec. 13, chap. 140 of 1850*) that the company may acquire title to any real estate required for the purposes of its incorporation, and the petition must state (*sec. 14*) that it is required for the purpose of constructing or operating the proposed road. The statute does not require separate petitions for lands needed for the route, and for lands needed for operating the road, nor to postpone the application for the latter until the former is obtained. In the nature of the case the latter class of property may be needed as soon as the other. The statute does not require separate descriptions; it simply says that the petition must contain a description of the real estate which the company seeks to acquire.

Whether it would not be more appropriate to have separate descriptions is not the question now before me. All that I need say now about it is that the statute does not require it. Nor is the question before me as to the character of the title obtained for the different purposes.

6. Whether or not, under the amendment of 1876, the company must tender the amount of the former award before renewing the proceeding, is a question to be determined at the trial.

The preliminary objections are overruled.

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SUPREME COURT.

WILLIAM H. WATSON agt. **NEW YORK, WEST SHORE AND
BUFFALO RAILWAY COMPANY.**

Railroads — Proceedings to acquire title to real estate — Practice in such proceedings — Injunction.

Where defendant commenced proceedings under this statute (*Laws of 1890, chap. 140*) to acquire for the purposes of its railroad certain real estate of the plaintiff, and commissioners were appointed who made their report; and on application of the defendant upon notice to plaintiff, an order was made that the proceedings be abandoned and discontinued on payment by defendant to the attorneys of the plaintiff of certain costs and expenses, the amount being fixed in the order. The amount as fixed has been tendered, but refused. The report was directed to be filed, but its confirmation was denied without prejudice. The present action is brought to obtain either the confirmation of said award and its payment by the defendant to the plaintiff, or the payment by defendant to plaintiff of his costs and expenses in the matter, which are alleged to be \$5,000. On motion by plaintiff for an injunction order restraining the defendant from taking any other proceedings to condemn said lands during the pendency of said suit, and also restraining it from entering into or taking possession of the property, and requiring it to restore certain portions of it to its original conditions:

Held, that as the case now stands a preliminary injunction restraining further proceedings by the company under the statute would not be proper.

Held, further, that as the opposing affidavits show that the defendant has not entered into possession of any of plaintiff's property, and does not intend to until authorized by law, the moving papers not showing a very serious injury in this regard, an injunction order would not be appropriate.

Held, also, that the necessity of a mandatory injunction order of restoration as to a certain portion of the property should appear very clearly, and the facts in this case do not require it.

Oneida Special Term, October, 1882.

Motion by plaintiff for injunction.

E. J. Richardson and George W. Adams, for plaintiff.

F. & W. Kernan and C. J. Everett, for defendant.

Watson agt. New York, West Shore and Buffalo Railway Co.

MERWIN, J.—In March, 1882, defendant commenced proceedings under the statute to acquire for the purposes of its railroad certain real estate of the plaintiff. Commissioners were duly appointed, and they, on August 2, 1882, made their report. At the Lewis special term, October 3, 1882, on the application of the defendant upon notice to plaintiff, and after hearing counsel on both sides, an order was made that the proceedings be abandoned and discontinued on the payment by the defendant to the attorneys of the plaintiff, of certain costs and expenses, the amount of which was fixed in the order.

The amount as fixed has been tendered, but refused. The report was directed to be filed, but its confirmation was denied without prejudice.

The present action is brought to obtain either the confirmation of said award and its payment by the defendant to the plaintiff, or the payment by defendant to plaintiff of his costs and expenses in the matter, which are alleged to be \$5,000.

The present motion is for an injunction order restraining the defendant from taking any other proceedings to condemn said lands during the pendency of this suit, and also restraining it from entering into or taking possession of the property and requiring it to restore a certain portion of it to its original condition.

Upon this motion I do not think it would be appropriate for me to investigate the propriety or correctness of the order of October third. That was made upon full hearing and is appealable. Assuming it to be correct, the proceedings there referred to are ended and the defendant in that regard has done only what it had a right to do under the statute and the order of the court, and such action should not stand in the way of any further rights it may have in regard to the property. As the case now stands, I do not think that a preliminary injunction restraining further proceedings by the company under the statute would be proper.

As to the other branch of the motion the opposing affi-

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davits show that the defendant has not entered into possession of any of plaintiff's property and does not intend to until authorized by law. The moving papers do not show a very serious injury in this regard, and in view of the denials on the part of the defendant, I do not think an injunction order would be appropriate.

In case there shall exist hereafter a different state of circumstances, the motion in that regard may be renewed.

The plaintiff also seeks an order of restoration as to a certain part of the property.

The necessity of a mandatory injunction of that kind should appear very clearly.

I do not think the facts before me require it.

Motion denied, with costs of motion to defendant to abide event.

N. Y. SUPERIOR COURT.

THOMAS MURTHA agt. MICHAEL CURLEY *et al.*

Costs — Who entitled to.

When the general term reverses a judgment and orders a new trial with costs of the appeal to the appellant to abide the event, and the respondent instead of submitting to a new trial, stipulates and appeals to the court of appeals and is there successful:

Held, that he is entitled to costs.

Special Term, December, 1882.

THE plaintiff obtained a judgment against the defendants at special term, from which judgment the defendant Curley appealed to the general term, where the judgment appealed from "was reversed and a new trial ordered, with costs of the appeal to the appellant to abide the event" (*See 15 J. & S., 393*). From the order of the general term the plaintiff appealed to the court of appeals, where the "order of the

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general term was reversed and judgment of the special term was affirmed, with costs." The clerk declined to tax the costs at general term before and after argument and the term fees for the reason that the order at general term gave the costs of appeal to the appellant to abide event. From this decision the plaintiff appealed to the special term.

Adolphus D. Pape and *H. S. Bennett*, for plaintiff, claimed that the court of appeals having reversed the order of the general term, the effect was not only to deprive appellant of the costs awarded, but to give respondent the costs of affirmance, that is, the court of appeals by reversing the general term and affirming the special term, decides that the plaintiff was right and ought to have succeeded at the general term.

Starr & Hooker, for defendants, cited *subdivision 3, of section 3251, Code of Civil Procedure*; *Naugatuck Cutlery Company agt. Rowe* (5 Abb. N. C., 143); *Sisters of Charity agt. Kelly* (68 N. Y., 628); *Morris agt. Randall* (8 Daly, 82); *Post agt. Doremus* (60 N. Y., 372); *Matter of Protestant Episcopal Public School* (86 N. Y., 397); *McGregor agt. Buell* (1 Keyes, 153).

ARNOUX, J.—This is a question of considerable importance to the profession. The practice of this court has always been on a reversal to make the order read "with costs to the appellant to abide the event." In this case the respondent instead of submitting to a new trial, stipulated and appealed to the court of appeals, and was there successful. In view of this result the order of the general term should be construed to mean that the costs were to be given to the successful party on that appeal. This proved to be the respondent, and he should tax the costs. This is in furtherance of justice, for if the respondent had taken a new trial, he would have ultimately taxed a much larger bill of costs than he has done.

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The clerk will allow the items of costs at the general term, as if they had in terms been awarded to the appellant in the court of appeals. As this appears to be a new question, no costs of this motion are allowed.

N. Y. SUPERIOR COURT.

DIEGO S. CARO *et al.*, respondents, agt. THE METROPOLITAN ELEVATED RAILROAD COMPANY, appellant.

Order — Whether an order of a former general term expresses the intent of the court, cannot be determined by another general term.

The general term cannot determine whether an order entered by a former general term upon a demurrer to the complaint expressed the intent of the court, without proceeding to hear anew the issues of law which were made by such demurrer.

General Term, November, 1882.

Before SEDGWICK, C. J., FREEDMAN and ARNOUX, JJ.

MOTION by defendant to vacate or resettle judgment by clerk upon order made by a former general term composed by judges other than those now sitting.

PER CURIAM. — It is impossible to determine from the record whether it was the intent of the general term which heard the demurrer, to direct judgment according to the forms which have been presented by the defendants on this motion, and not according to the form actually entered, unless the general term should proceed to hear anew the issue of law which was made by the demurrer. The former general term ascertained what facts alleged in the complaint constituted a cause or causes of action, and what was the proper relief. Of course, this general term cannot review the decision. The peculiarities of the situation are practically shown by the fact

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that defendants now present two forms of judgment, which seem to be based upon distinctly different views of plaintiff's rights. There is no sufficient ground, therefore, for directing judgment as asked by the defendants.

It is not intended to deny that this court would have the power to vacate the judgment entered by the clerk, if it appeared that it was not in conformity with the order which the former general term made. In this case, however, in view of its history disclosed by the record, it does not appear that the defendants have an absolute right to have this question determined. The correspondence between the attorneys show that the case was shaped for the purpose of getting the judgment of the court of appeals upon the rights of the parties.

If the present judgment were set aside it might result in another hearing, at a general term, of the appeal from the special term. An appeal from the present judgment will result in an adjustment of the defendants' claim.

The motion should be denied, without costs.

N. Y. SUPERIOR COURT.

DIEGO S. CARO *et al.*, respondents, agt. THE METROPOLITAN
ELEVATED RAILROAD COMPANY, appellant.

Practice as to entry of judgment — Order — Special term cannot pass upon intent of general term order.

After the settlement of a general term order, and the taxation of costs, the entry of judgment follows, as matter of course, in conformity to the order, no notice of entry of judgment being required.

The special term cannot pass upon the question whether a general term order expresses the intent of the court.

General Term, November, 1882.

Before SEDGWICK, C. J., FREEDMAN and ARNOUX, JJ.

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Caro *et al.* agt. Metropolitan Elevated Railroad Company.

APPEAL from an order denying motion to vacate or resettle judgment.

Julien T. Davies and *Roger Foster*, for plaintiffs, respondents.

Dorsheimer, Bacon & Deyo, for defendant and appellant.

PER CURIAM.—On or about the 27th day of June, 1879, judgment in this action was entered in defendant's favor upon a demurrer, from which judgment an appeal was taken, and on or about the 5th day of April, 1880, the judgment was reversed and judgment directed for plaintiff. The order was settled on notice and was absolute. The original plaintiff having died the action was revived, and thereafter, and on or about the 10th day of May, 1882, judgment herein was entered without notice of any kind. Thereupon defendant's counsel moved the special term to vacate or resettle the order upon an affidavit of one of the attorneys for defendant, in which he states that the judgment was entered without notice, and that he believes that it does not express the intent of the court. This motion was denied.

After settlement of a general term order and the taxation of costs, the entry of judgment follows as matter of course. It is the clerk's duty to see that the judgment conforms to the order. Neither the law nor the practice of the court requires notice of entry of judgment to be given.

The question was made, not that the judgment did not follow the order, but that the judgment did not express the intent of the court. This was not a question for the special term to pass upon.

The order was right, and should be affirmed, with ten dollars costs.

Styles agt. Price.

SUPREME COURT.

LUOY N. STYLES agt. FREDERICA R. PRICE, CHARLES HICKOX
and HELEN B. HICKOX.

Mortgage — Deed — Estoppel — Acceptance of deed of certain premises with an assumption clause that the conveyance was subject to "all liens and incumbrances of record on said premises," estops the party from contesting the validity of mortgage upon the premises at that time upon record.

The defendant, after having accepted a deed of certain premises with an assumption clause that the conveyance was subject to "all liens and incumbrances of record on the said premises," is estopped from contesting the validity of a mortgage upon the premises at that time upon record, and is liable for any deficiency that may arise upon the sale of the mortgage premises upon foreclosure of said mortgage.

Special Term, October, 1882.

Kelly & McCrea, for plaintiff.

Winslow & Van Cott, for defendant.

LAWRENCE, J. — The only witnesses examined on the trial of this case were Charles R. Hickox, the defendant, and Henry P. Niebuhr, the brother of the defendant, Frederica R. Price. The conflict in the testimony of these witnesses as to the mortgage which is the subject of this action, is direct and positive, and I have been somewhat embarrassed in arriving at a conclusion as to the true state of facts.

After examining the testimony and the exhibits introduced in evidence by the respective parties, I have concluded that the weight of the evidence is in favor of the proposition that Mr. Hickox knew of the existence of the mortgage in question. This, I think, is apparent from the testimony of Niebuhr and the defendant Hickox, and from the memorandum (*Exhibit M*) made at the time of the payment of the original mortgage for \$3,928.91, executed by the defendant Price to the plaintiff on the 21st of August, 1880.

The understanding between the plaintiff Styles and the

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defendant Frederica R. Price (then Niebuhr) is apparent from the plaintiff's exhibit No. 3, bearing date September 21, 1880. Upon the payment or settlement of the mortgage for \$3,928.91, it appears that the sum of \$1,028.91 was paid to the husband of the plaintiff, who represented his wife in the transaction, and that the balance, with the exception of a few dollars, was paid, at the request of Styles, to Henry P. Niebuhr, who represented his sister, the defendant Frederica R. Price. It appears by the evidence that the moneys paid to Henry P. Niebuhr were expended in payment for work, labor and materials used and furnished in and upon the buildings in the course of erection upon the mortgaged premises.

Weighing all the probabilities of the case in the light of the evidence presented on the trial, I think it must be concluded that it was understood that Styles should assign the mortgage for \$3,928.91, which was prior to all the mortgages then held by Hickox, except the mortgage referred to in the agreement of January 13, 1880, for \$24,000, and take back a mortgage which should become a lien from the date of the settlement of the prior mortgage, or from the date of the execution of the second mortgage.

It is said, however, that the agreement of the 13th of January, 1880, between the defendant Frederica R. Price (then Niebuhr) and the defendant Charles R. Hickox, to the effect that the former should not put upon the property therein described any other mortgage than the one for \$10,000 to the Emigrant Industrial Savings Bank, and the other for \$24,000 to the said Charles R. Hickox, each of which was dated on said January 13, 1880, "until said two mortgages have been paid off and satisfied, and that when the same are paid and satisfied, that she will not mortgage the houses and lots fronting on One Hundred and Twenty-first street, or any or either of them, for more than \$5,000," having been recorded in the office of the register, was notice to the plaintiff, and that therefore the mortgage in suit is null and void. I think that the answer to that position is this: That the mortgage for

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\$3,928.91 to the plaintiff was executed on the 21st of August, 1880, and recorded on the 4th of September, 1880, or long after the execution and recording of the agreement aforesaid. The validity of said mortgage was recognized by Hickox in the settlement which he made on the 21st of September, 1880; and, as I have concluded, as before stated, upon all the testimony in the case, that Hickox must have known that it was intended to secure Styles for that portion of the proceeds of the first mortgage which was handed over to Henry P. Niebuhr, as the agent of the defendant, Frederica R. Price, to pay for work, labor and materials, by a mortgage upon the premises, it would seem that Hickox had actual notice that a new mortgage was to be given. I think that the plaintiff is entitled to the usual judgment of foreclosure and sale.

If the views which I have already expressed are erroneous, there is another ground upon which I think that the plaintiff is entitled to the relief which she seeks in this action. When the defendant discovered that the mortgage in suit had been put upon record, if he intended to contest the validity of that mortgage, he should instead of accepting the deed tendered to him have insisted upon a deed exempting from the operation of the assumption clause contained in the deed, the mortgage executed by Frederica R. Price to the plaintiff. Having taken a deed "subject to all liens and incumbrances of record on the said premises, and subject to all bills for labor and materials upon the buildings thereon unpaid, which the party of the second part by the act of accepting this deed assumes and agrees to pay." I think that he is estopped from contesting the validity of said mortgage (*See Parkinson agt. Shennan*, 74 N. Y., 88; *Freeman agt. Auld*, 44 N. Y., 50; *Burr agt. Beers*, 24 N. Y., 178; *Bigler agt. Morgan*, 77 N. Y., 312). I think, too, that he is liable for any deficiency which may arise upon the sale of the mortgaged premises (*See Comstock agt. Drohan*, 71 N. Y., 9; *S. C.*, 8 Hun, 373; *Whittemore agt. Farrington*, 76 N. Y., 452; *Campbell agt. Smith*, 71 N. Y., 26; *S. C.*, 8 Hun, 6).

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On the whole case, I am unable to satisfy myself that any fraud was perpetrated upon the defendant in the execution of the mortgage in suit, or that, as the burden of proof rests upon the defendant, in attempting to avoid the natural and legal consequence of the assumption clause contained in the deed delivered to and accepted by him, he has succeeded in making out a case which renders it the duty of the court to give to that clause any other than its natural legal interpretation and effect.

Certain evidence was admitted by me upon the trial, subject to objection. I have determined to receive such evidence without qualification, and will give to the objecting party the appropriate exception.

Judgment accordingly. Findings may be settled on two days' notice.

COURT OF APPEALS.

BENJAMIN A. MAYOR, appellant, agt. ANNIE E. MAYOR,
respondent.

*Consolidation of actions—Code of Civil Procedure, sec. 817—What actions
may or may not be consolidated.*

When a plaintiff, as devisee, institutes separate actions for the partition of real property situated in different counties, and it appears that one of the defendants is only interested in the land situated in one county; that in such case the court has no power to consolidate said actions, but each of the same must be tried in the county where the land is situated.

December, 1882.

This was an appeal from an order made by the supreme court, in the second department, consolidating two actions brought by the plaintiff against several defendants to partition certain real estate situated in the counties of New York and Kings, in which he had become vested with an interest as devisee, under the will of his father, deceased. It appears

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that the defendants, Lowe and wife, had an undivided half interest in the land situated in New York county, but no interest in the land situated in Kings county.

Abram King, for appellant.

Adolph Simis, Jr., for respondent.

FINCH, J. — The order of consolidation must be reversed, because the special term had no power to make it. The authority to consolidate actions is given by section 817 of the Code, and permits it only where both actions are pending between the same plaintiff and the defendants for causes of action which might have been joined. That is not the case here. The actions were for partition. The subject of one action was land in the city and county of New York, and the other, land in the county of Kings, and two of the defendants, Lane and wife, in the New York action, were not parties to the Kings county action, and had no interest in the subject of the latter action. By the consolidation they are exposed to the possible costs and expenses and the delays of a litigation in another county, in which they have no interest. In such a case the consolidation does not consolidate. The two actions remain two, and cannot become one. All that is effected is an improper change of the place of trial from New York to Kings, and a concurrent trial of two actions, having neither the cause, parties nor the same subjects of action. The Code does not authorize such a proceeding.

The order of the general term and of the special term should be reversed, with costs.

All concur, except RAPALLO, J., absent.

Bates *et al.* agt. Plonsky *et al.*

SUPREME COURT.

ANDREW J. BATES *et al.* agt. SAMUEL PLONSKY *et al.*

Attachment—Action to establish the priority of a levy under an attachment over an assignment previously executed and judgments previously confessed, when may be maintained.

An action to establish the priority of a levy under an attachment over an assignment for the benefit of creditors previously executed, and judgments previously confessed on the ground that they are fraudulent as to creditors, and therefore void, cannot be maintained if the property assigned or transferred is of an intangible nature, but can be maintained if the property is of a tangible nature capable of manual delivery.

First Department, General Term, October, 1882.

Before BRADY, P. J., BARKER and DANIELS, JJ.

THIS action was brought to set aside judgments and executions alleged to be fraudulent as incumbrances in the way of plaintiffs' attachment. The defendant contested the right of plaintiffs to institute such suit, they not being judgment-creditors. An injunction restraining the sheriff from satisfying the executions of the defendants was granted by judge BARRETT, from which an appeal was taken.

Otto Howitz, for appellants.

Blumensteil & Hirsch, for respondents.

DANIELS, J. — The action has been brought to secure the priority of the plaintiffs' rights under attachments issued against the defendant, Samuel Plonsky, over an assignment executed by him for the benefit of creditors, and over executions issued upon judgments confessed by him in favor of others of the defendants. The attachments issued on behalf of and for the plaintiffs were levied upon the stock in trade of boots, shoes and fixtures of the debtors, and the executions

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upon the confessed judgments were also levied upon the same property. These judgments, as well as the general assignments, are alleged to have been made and entered with the intent to hinder, delay or defraud the creditors of the debtor. And for that reason the plaintiffs claim priority over the general assignee, and the creditors in the judgments confessed, although their attachments were afterwards, in point of time, levied upon the property; whether such an action can be maintained by them, under the circumstances, is the point upon which the appeal has been placed in the argument. It is entirely clear that no such suit could be maintained for the vindication and establishment of the rights of the attachment-creditors, if the property seized under the attachments had not been of a tangible nature (*Smith agt. Longmire*, 24 Hun, 257). This disability results from the circumstance that such property, after having been assigned or transferred, even though that may have been done fraudulently, cannot be made subject to an attachment as long as such transfer remains in force. But, where the property is not of that character, but is capable of being taken into the manual possession of the sheriff, there this difficulty does not exist. Notwithstanding the fraudulent transfer, such property may still be seized by virtue of the attachment. And the propriety of the seizure may be sustained when that is brought in question by showing that the transfer itself was fraudulent and inoperative as against creditors. This right to assail such a disposition of the debtor's property results from the fact that the creditor is entitled to have it seized by virtue of his attachment, and after that to maintain the propriety of such a seizure of it. The Code has provided that the levy may be made upon property capable of manual delivery by taking the same into the sheriff's actual custody (*Code Civ. Pro.*, sec. 645, *subd.* 2). This provision is so general in its character as to include no exception; and consequently property, the title to which may have been fraudulently transferred, may be made the subject of the seizure the same as though it

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remained in the debtor. To render such a seizure entirely effectual, the creditor may show in vindication of it, that while the title to the property had been, in form, transferred, that it was done to defraud creditors, and in that manner avoid and annul it (*Thurber agt. Blanck*, 50 *N. Y.*, 80; *Frost agt. Mott*, 34 *id.*, 253). This case has been brought within this principle, for the complaint shows an actual attachment of the property, and that it was all property which could be taken into the manual possession of the officer. Upon the basis of the lien created in that manner no good reason seems to stand in the way of an action of this nature, brought to re-establish the right of the attaching creditors to appropriate it through the instrumentality of the attachments, to the payment of any judgments they may recover in the action; and that really is all that is intended to be accomplished by the present suit. The injunction extends no further than to protect the creditors' rights during the pendency of the action in case they shall ultimately appear to be entitled to this relief. For it simply, in the meantime, restrains the payment of any of the proceeds of the property of the debtor to the defendants or either of them upon the executions issued to collect the judgments confessed by the debtor, and it included only the property seized by virtue of the plaintiffs' attachments. Even this restraint is more formal than real, for the reason that the direction given to the sheriff requiring him to deposit with the chamberlain the amount of such proceeds, subject to the final determination of this action, would practically accomplish the same result. And such an order as that would, very much as a matter of course, have been made upon a motion, where a contest of this nature existed as to the proceeds between the several parties proceeding against the property. The appeal taken from the order cannot be sustained, but it should be affirmed, with ten dollars costs, besides the disbursements.

Beer agt. Benner.

N. Y. COMMON PLEAS.

LOUIS BEER, appellant, agt. GEORGE H. BENNER, respondent.

Interpleader — Power of district courts to grant.

The district courts of the city of New York have power to grant orders of interpleader, and such power is not taken away or affected by the Code of Civil Procedure.

General Term, November, 1882.

Before J. F. DALY, and VAN BRUNT, JJ.

APPEAL from judgment of justice Steckler, of fourth district court, in favor of defendant, entered on verdict of a jury.

The action was originally brought against Peter Diehl, but George H. Benner was interpleaded as defendant, on Diehl's motion, in pursuance of an order entered on an opinion of justice Steckler.

Plaintiff sued for \$250, balance of commission as broker for the sale of premises on Eightieth street. Benner claimed the money on the ground that he was originally employed by Diehl to find a purchaser for the lots, and that he employed Beer, the plaintiff, to do the work.

The jury found in his favor.

The main question presented is whether the district courts had power, at the date of the order of interpleader in the action (April 3, 1882), to make such an order.

C. M. Roeder, for appellant.

Lorenz Zeller, for respondent.

J. F. DALY, J. — This was a proper case for interpleading. Benner, who claimed the money for which the suit was brought, because he alleged himself to be the actual contractor with Diehl, and claimed that the plaintiff was his agent and not an independent contractor. Diehl, therefore,

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stood as a mere stakeholder of a fund which belonged to one of two claimants, and was properly relieved of the suit on paying the money into court and substituting Benner as defendant. The question is whether the district courts had power at the date of the order of interpleader in the action (April 3, 1882) to make such an order. Prior to the Code of Civil Procedure the district courts had that power (*Dreyer agt. Rauch*, 10 *Abb. Pr. [N. S.]*, 344). It was so held for the reason that section 48 of the district court act (*Laves of 1857, chap. 344*) made the provisions of sections 55 to 64, both inclusive, of the Code of Procedure applicable to the district courts. Section 64 of the Code of Procedure, subdivision 15, declared that the provisions of that act (the Code), respecting parties to actions, should apply to the district courts. The provision for interpleader (*sec. 122*) was embraced in title 2, regulating parties to civil actions.

The Code of Procedure has been repealed, but section 48 of the act of 1857 has not been repealed. It reads as follows: "Section 48. The provisions of section fifty-five to sixty-four, both inclusive, and of section sixty-eight of the Code of Procedure, shall apply to these courts, except that the transcript of judgment specified in the latter section shall be furnished by the clerk of the court in which the judgment was rendered, and also except that the execution may issue as well out of the district court in which the judgment was rendered as out of the common pleas."

There are provisions in the new Code relating to transcripts of and executions upon judgments of these courts which supersede so much of section 48, above quoted, as regulates those matters (*Sec. 3220*).

And there are other provisions of the new Code which partially supersede the regulations found in sections 55 to 64, and section 68 of the Code of Procedure. But there is no provision in the new Code as to interpleader in these courts, and so much therefore of the former practice is not superseded by any provision in the new practice.

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We must assume that the legislature in not repealing section 48 (although it included a direct reference to certain provisions of the old Code, and made the practice thereunder the practice of the district courts) had a purpose in view, and this purpose undoubtedly was to preserve to suitors and litigants in the district courts all the benefits which the section (48) was originally intended to confer. Among these none are so important and beneficial as the provision giving to defendant in certain cases the right to interplead the real contestant.

We shall, I think, be giving the natural and ordinary effect to the legislative intention as expressed in its acts, and its omission to act, if we hold:

1. That by section 48 of the district court act, so much of the practice of the Code of Procedure as may be embraced within section 55 to 64, inclusive, and section 68, was made the practice of the district courts as fully and completely as if those provisions were incorporated in full in the act in question (*Chap. 344, Laws of 1857*).

2. That the omission to repeal section 48, when other portions of the act were expressly repealed (*see repealing act, chap. 245, Laws of 1880*), is an expression of legislative will that such portion of the practice under that section as was not superseded by the new Code should be retained.

3. That this intention is confirmed by section 4 of the new Code, which, after an enumeration of all the courts in section 3, declares that "each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law according to the course and practice of the court, except as otherwise prescribed in this act," and by section 3214 of the new Code, which provides that "except as otherwise specially prescribed in this title, this act does not affect any statutory provision remaining unrepealed, after this chapter takes effect, relating to the jurisdiction and powers of either of those courts." Section 48 of the act of 1857 is an unrepealed statutory provision relating to the powers of those courts.

There are no exceptions of importance in the case. The

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attempt to contradict defendant by introducing his letter-heading, was a contradiction upon a matter drawn out in cross-examination, and not involved in the issues, viz., as to whether he represented himself to be a member of a law firm.

The motion to strike out an answer as irresponsible was improperly denied, because part of the answer was responsive.

The exception to the refusal to charge that the burden of proof lay on the defendant was properly denied, because the plaintiff alleged in his complaint employment by Diehl, and the finding of a purchaser, which was denied by Benner's answer, and he was bound to prove it.

The request to charge should have been limited to what was strictly affirmative in Benner's defense.

Judgment should be affirmed.

VAN BRUNT, J., concurs.

SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD CAVANAGH, appellant, agt. DAVID MCADAM, justice of the Marine Court, respondent.

Mandamus against a judicial officer — Summary proceedings — Code of Civil Procedure, sections 2234-2238 — entertaining an application by a landlord to remove a tenant under the statute relating to summary proceedings is in the discretion of the justice.

When the time of a justice is required and devoted to other business, having precedent demands upon him as a member of the court, he is reasonably excusable for not entertaining an application by a landlord to remove a tenant under the statute relating to summary proceedings. While the language of the act is mandatory in its terms, it could not have been intended to deprive the justice of the discretion vested in judicial officers.

The allowance of the writ of *mandamus* is discretionary, and the discretion will not be exercised against a judicial officer in such a case.

First Department, General Term, November, 1882.

Before DAVIS, P. J., DANIELS and BRADY, JJ.

The People *ex rel.* Cavanagh *agt.* McAdam.

APPEAL from an order denying an application for a writ of *mandamus*.

Roscoe H. Channing, for appellant.

Henry Wehle, for respondent.

DANIELS, *J.* — The writ was applied for because the justice declined to entertain an application for summary proceedings to remove a tenant from demised premises for the nonpayment of four dollars and fifty cents rent. The time of the justice appears by his return to have been required and devoted to other business having precedent demands upon him as a member of the court. And because of that circumstance he was reasonably excusable for not entertaining the application, although the Code has declared that the judge or justice to whom such a petition is presented must thereupon issue a precept (*Code of Civil Procedure*, sec. 2238). For it did not declare that he must also withdraw his time and attention from the other necessary business of the court for that purpose; and while the language of the section is mandatory in its terms, it still could not have been intended to deprive him of the original discretion vested in judicial officers (*Spears agt. Mayor, &c.*, 72 *N. Y.*, 442).

If he had been the only officer to whom such an application could regularly be made, a very different consideration would arise in the case, but by section 2234 of the Code of Civil Procedure a variety of other officers were vested with the same power, to whom the relator had the right to apply. And his application for this writ, instead of bringing his case before one of these other officers, indicates the existence of the disposition rather to annoy the justice proceeded against than to invoke the powers of the court for the purpose of redressing and vindicating a legal right. There is nothing in *Dehart agt. Hatch* (3 *Hun*, 375) countenancing such a proceeding, and as the allowance of the writ was subject to the

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discretion of the court (*Faile agt. Ferris*, 76 N. Y., 326), that was, under the circumstances presented, very wisely exercised in refusing to order the writ to be issued.

The order should be affirmed, with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

Insurance (life) — Contracts with general agents for a stipulated number of years, at a specified yearly salary, ends with the corporate dissolution by the action of the state, and the agent has no valid claim for damages for an alleged breach of the agreement by the company — So, too, as to the procurement of policies of insurance and per centage upon same, and also as to per centage upon renewal premiums.

When a life insurance company has contracted with a person to act as its general agent for a stipulated number of years, at a specified yearly salary, and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the state before the expiration of the term for which such agent was hired, the agent has no legal right to recover from the funds in the hands of the receiver the salary fixed by the agreement for the unexpired term of service, as damages for not continuing the employment; the contract ends with the corporate dissolution by the action of the state, and because such action prevented further service, the agent has no valid claim for damages for an alleged breach of the agreement by the company.

When, by the contract between the general agent and the company, the former is, upon the procurement by him of a policy of insurance, to be paid a certain per cent upon the first premium received from the insured, and also a per centage upon every renewal premium thereafter paid, and the payment of renewal premiums upon policies of insurance procured by such agent is prevented by the insolvency of the company, the appointment of a receiver and its dissolution by the state, no damages can be recovered by such agent by reason of the non-renewal of policies, which he had procured prior to such insolvency, receivership and corporate death.

When a general agent, whose compensation depended in part upon his success in procuring policies of insurances, to be taken in a life insur-

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ance company, upon which policies, when procured by him, he was to receive an agreed per centage upon the premiums paid, is before the expiration of the period for which he was employed by such company, prevented by the insolvency receivership and dissolution of such company, at the suit of the people of the state, from obtaining in it further policies of insurance, he is not entitled to damages by reason of his being thus deprived of the opportunity to earn money during the unexpired term of his agency by procuring policies of insurance in such company.

Ulster Special Term, October, 1882.

Motion to confirm referee's report respecting the claims of the "general agents" of the corporation for damages growing out of contracts for service.

George W. Wingate, for receiver.

Edward C. James, for agents.

William D. Whiting, for policyholders.

Lucius McAdam, for policyholders.

Raphael J. Moses, for policyholders.

WESTBROOK, J. — The reports of the referee, William McDermott, rejecting the claim of Jas. D. Wells, who was the general agent of the defendant for the Dominion of Canada, and that of James C. Mix, who was its general agent at Syracuse, in the state of New York, presents three questions :

First. When a life insurance company has contracted with a person to act as its general agent for a stipulated number of years, at a specified yearly salary, and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the state, before the expiration of the term for which such agent was hired, has the agent any legal right to recover from the fund in the hands of the receiver the salary fixed by the agreement, for the unexpired term of service, as damages for not continuing the employ-

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ment; or did the contract end with the corporate dissolution by the action of the state, and because such action prevented further service, has the agent no valid claim for damages for an alleged breach of the agreement by the company?

Second. When by the contract between the general agent and the company, the former is, upon the procurement by him of a policy of insurance, to be paid a certain per cent upon the first premium received from the insured, and also a per centage upon every renewal premium thereafter paid, and the payment of renewal premiums upon policies of insurance procured by such agent is prevented by the insolvency of the company, the appointment of a receiver and its dissolution by the state, what damages, if any, can such agent recover by reason of the non-renewal of policies, which he had procured prior to such insolvency receivership, and corporate death?

Third. When a general agent, whose compensation depended in part upon his success in procuring policies of insurance to be taken in a life insurance company, upon which policies, when procured by him, he was to receive an agreed per centage upon the premiums paid, is, before the expiration of the period for which he was employed by such company, prevented by the insolvency receivership and dissolution of such company, at the suit of the people of the state, from obtaining in it further policies of insurance, what damages, if any, is he entitled to by reason of his being thus deprived of the opportunity to earn money during the unexpired term of his agency, by procuring policies of insurance in such company?

These questions are to be answered in a proceeding affecting a fund in the hands of a receiver of an insolvent and dissolved corporation for distribution, and in the light of the consequences to such fund depending upon such answers. Whatever sum is allowed to either of these general agents as damages is really so much taken from a fund created by premiums paid for insurance by policyholders, who are also seeking, by the recovery of damages for a broken agreement

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to insure, to get back a part of the money actually paid for insurance, and of which they have been deprived. The assets of the defunct and dissolved corporation are insufficient to make good the loss of the parties who placed their money into the hands of its agents and officers in the hope and belief that they would so manage and conduct its affairs as to indemnify them or their families according to the terms of the contracts given to them at the time of the payment of their premiums.

A corporate body manifests its life only through officers and agents. When the latter speak or act in behalf of the corporation, such speech or act is that of the artificial being which they represent. Viewing the claims made by these agents, which the referee has rejected, in the light of the *status* which they occupied towards the policyholders, it is impossible to see upon what equitable grounds, at least, they can share in the fund for distribution with those whose means created it. The questions propounded are not to be answered upon the theory that an action has been brought against a corporation still in being, by its general agents, for breaches of its contract with them, and of its duties towards them. If that was the case the arguments of the learned counsel for the claimants would, perhaps, be unanswerable. It is impossible to deny that the corporate body and its superior officers do owe certain duties to some of its employees, at least, with whom it makes contracts of service. There must be, however, when a corporate body has become insolvent, some limit to the application of this rule, for there may be officers of a corporation having with it contracts for service who, from their official positions, were so identified with its management as to be estopped from claiming damages against it for their non-fulfillment by reason of insolvency. This exception to the general rule of corporate liability for a breach of contract, caused by inability to perform, is evident. The difficulty consists in its application and in the designation of those who must be deemed a part of the management which

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caused the bankruptcy. In determining a question of this character it is certainly not inequitable, at least, to consider the effect of a claim made by an officer of a dissolved corporation upon the fund to be distributed among its creditors, which is based upon an alleged failure of duty towards him in maintaining its financial standing, and the consequences of its allowance upon the rights of others to share in that fund, who were in no way connected with its management, and in regard to whose demands there cannot be even a quibble. Let us, then, examine this case from this standpoint.

Before the court, as rival claimants of the fund in its hands, on the one hand are the officers of the company — its general agents — who are in part at least responsible for its condition; and on the other, individuals who parted with their money, on the faith of representations made by the persons claiming adversely to them, for insurance and protection which they never have, and never can obtain. In determining between these opposing and conflicting claims, it is impossible to close our eyes to the fact that in the making of contracts of insurance, as between the insurer and insured, the general agents, who are claimants, represented the former. Whether such agents acted in good faith or in bad faith, with knowledge of the insolvency of the corporation, or without such knowledge, in either they represented the corporation. It was their action, their arguments and their persuasions which prevailed with the insured to accept the contracts of the corporation now insolvent and in receiver's hands, and to place them upon an equality with those for whose unfortunate condition they are responsible, would be equivalent to making an injured party pay the individual injuring him for the labor of inflicting it. This result, so contrary to reason and justice, ought not to flow from the adoption of any supposed legal rule for our guidance, for the law, being the perfection of both reason and justice, can do violence to neither. As the corporate being, now dead and dissolved, acted through agents, of whom the claimants formed a part,

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their acts toward the insured were those of the corporation, and in considering and disposing of the two classes of claims upon a fund for distribution, the fact cannot be overlooked, that while agents, for services rendered and agreed to be rendered, may in some cases have valid claims against the corporation whose servants they were, if it was still in being, having property and funds belonging to it, yet that they cannot have such claims allowed as against persons or parties toward whom they occupied the position of insurer, and who were induced by them to take contracts of insurance in a corporation which was unable to fulfill its obligations.

The equity of the foregoing line of thought is apparent, and the only plausible answer, as it seems to me, which can be made to it is, that the statute (*chap. 902, Laws of 1869, sec. 8*) provides, in the case of an insolvent registered company (and the Globe life was such an one), after paying all registered policies in full, the remainder of the fund arising from the conversion of its assets into money, "shall be then applied to the payment of all the just debts of said company incurred in the conducting and carrying on its lawful business."

The argument on the part of the claimant is, that the corporation had a right to make contracts of service for a term of years, and that insolvency and inability on its part to perform them, and even the action of the state, taking the corporate life, did not excuse non-performance, so as to bar a claim for the damages flowing from such non-performance, because, as it is said, the corporation owed to them, as it did to policyholders, the duty of keeping itself solvent.

This argument, which has been already partially answered, is certainly plausible, and upon the presentation of these cases it impressed me favorably. Further reflection, however, satisfied me that, as its adoption in this case will result in absolute injustice to the policyholders, the law must make some distinction between the classes of contracts, or the individuals towards which or whom it applies the doctrine, that the act of the state extinguishing the corporate life does not

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bar a claim for damages for non-performance, when the action of the state was induced by the misconduct of the corporation. Undoubtedly the rule contended for by the counsel of these claimants, is applicable to policyholders (*Security case*, 78 *N. Y.*, 115, 125), and may be to other persons. Is it applicable, however, to the parties whom he represents?

James D. Wells, one of the claimants, agreed to serve the corporation for ten years, from July 15, 1876, as its "general agent" for the "Dominion of Canada," and the other, James C. Mix, for five years from April 22, 1877, as its "general agent at Syracuse." Both have been paid the stipulated salary for the term of actual service, but both claim the damages they allege to have been sustained by the non-payment of salary during the unexpired term of their contracts; and both claim such damages as they aver were caused to them by the dissolution of the corporation, flowing from the non-renewal of policies obtained, and their inability to procure new and other policies during the unexpired terms of their agencies. The validity of these claims depends upon the effect of the state's action in preventing the corporation from continuing its business. The claimants insist, as has been already stated, that the act of the state in ending the life of the corporation cannot absolve it from performing its contracts, nor bar the claims for damages because as to them, as to the policyholders, it owes the duty of preserving its solvency. The report and conclusions of the referee, on the other hand, are, that the act of the state, terminating as it did the corporate existence, absolutely excused performance of the contracts, and that as no renewal premiums could thereafter be received, nor further business done, the claimants, by the terms of their contracts, cannot obtain a per centage upon premiums never to be paid, nor obtain damages based upon future business, which can never be transacted. Which of these views is sound?

In answering the question just propounded, it is not nec-

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essary, as already intimated, to lay down a general rule of law to be applicable to every contract made by a life insurance company in regard to future service, or any other subject, nor will such an attempt be made. We are dealing now only with those before us, and to and of them the discussion relates.

The claimants were, as just mentioned, general agents of the Globe Mutual Life Insurance Company, each having a locality, the business in which he supervised. Each knew when his contract was made, that its value, and its continuance, depended upon the management of the corporation, which if careless, void of judgment or dishonest, could only terminate in proceedings by the state which would end its life, and prevent the further execution of the agreement. The contracts entered into between the claimants and the company made the former a part of the managing and directing force of the latter. To the outside public, and especially to those persons who by their action or that of their associates, were induced to take out policies of insurance in the company of which these claimants were important officers, they were the company. Possibly they were not personally sharers in the mismanagement which has resulted in the company's insolvency and death, but their associates were; and when a court has before it for adjudication claims based upon contracts for service in the corporate management, and others founded upon agreements entirely distinct therefrom — those with policyholders for example — it cannot fail to see a wide distinction between them as to their meritorious character. The agreements under consideration made under the circumstances which have been stated, must be held to end with the legal death of one of the contracting parties, such death, as the natural death of one of two individual contracting parties, giving no cause of action for damages on account of non-performance, because performance has become impossible. This result follows for two reasons: First. They were contracts for services which could only be rendered if the corporation continued in being, and subject to the contingency of its death,

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and in view of its possibility they were entered into. As failure in business is always possible, because it is subject to many surroundings, the parties who made them must be held to have taken upon themselves that risk, and when the corporate death occurred, the agreements of service were as completely terminated, without any claim for damages, as if an express provision to that effect had been contained in the written instruments which evidenced them; and, second, because these claimants were, by their contracts for service, so united to the corporate management as to share its responsibilities. The corporate being, upon the misconduct of which their claims for compensation are based, could not, as an individual, personally mismanage its affairs. Such mismanagement was that of those who superintended and controlled its business, and among those were these claimants. Probably others were their superiors, but when a corporation becomes insolvent, subjecting many persons to grievous loss, it is impossible in determining and selecting those who are to be indemnified, as far as possible, out of its assets, to nicely weigh the official conduct of every individual connected with its management. Men must often be held accountable for the misconduct of those with whom they voluntarily associate themselves in the conduct of a business; and, as these claimants were so associated, and, in making contracts with others, they were clearly the representatives of the corporation—their words, acts and deeds those of a corporation—the corporate management of which they complain must be held to be theirs, and therefore giving them no claim for damages, which makes for them a just debt against the corporation, thus enabling them to share with those with whom they contracted in the corporate name, the remnants of trust funds, which have been squandered and wasted by almost criminal mismanagement.

In reaching the conclusion just announced, it is proper to say that I have been unable to find a case precisely like the present, though reference was made upon the argument to

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several. The one which most nearly approximates it, is *Commonwealth agt. Eagle Fire Insurance Company* (14 Allen, 344). In that, the president, on January 1, 1862, had, by the action of the directors of the corporation, been voted a salary of \$1,000 per annum "for the present, or until the success of the company is firmly established." Subsequently, upon the petition of the insurance commissioners of the state (Massachusetts), alleging, "that the condition of the Eagle Fire Insurance Company was such as to render its further proceedings hazardous to the public, and to those holding its policies," an injunction was granted restraining the company from proceeding further with its business. This injunction was afterward modified so as to permit the company to elect officers, and do all acts necessary to continue its corporate life, until its affairs should be closed. As the president acted as such, during the semi-corporate life, he claimed the full salary originally ordered by the directors. This claim was refused, the court saying: "The president of the company did not render all the services for which his salary was to be paid, the exercise of his office having been suspended by legal authority." In other words, it was held, that the act of the state ended the contract.

For the reasons which have been stated, and upon the authority of the decision just referred to, the claims of Mr. Wells and of Mr. Mix, for damages caused by the non-fulfillment of their contracts by the corporation, must be disallowed. The agreements for future service terminated with the death of the company by the action of the state. A few words must be added in regard to the renewal premiums upon policies obtained by them prior to the insolvency of the corporation, and which renewals such insolvency prevented. The point made in their behalf is, that they are entitled to such damages because their per centage upon renewal premiums would have compensated them for past services actually performed, and as such renewals were prevented by the act of the company, they are entitled to be made good for that of

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which they have been thus deprived. It has already been shown, that the act of the company so-called, was one for which they must share the responsibility; but there is another reason for the rejection of the demands based upon the loss of renewal premiums, which will now be stated, and it is this: By the terms of their contracts they were entitled only to commissions upon premiums actually received by the company, and as it is conceded that none have been received, nor ever will be, no commissions are due.

Ensoworth agt. The New York Life Insurance Company (1 *Bigelow's Ins. Cases*, 645); *Lewis agt. Atlas Mutual Life Insurance Company* (61 *Mo.*, 534); 5th *Bigelow's Insurance Cases*, 239; and *Etna Life Insurance Company agt. Nixon* (an *Indiana decision*, reported in vol. 11 of the *Insurance Law Journal*, page 570), which have been cited as decisive of the question, were all cases between agents and existing corporations, and in neither had the state intervened and terminated the life, and in neither was the right to recover per centage upon renewal premiums which could never be received, considered or discussed. Neither is therefore applicable to the present.

In *Hercules Mutual Life agt. Brinker* (77 *N. Y.*, 435), an agent had been discharged, and in an action brought against him by the company for money in his hands, the court held that he could offset his per centage upon renewal premiums actually received by the corporation, which were paid upon policies he had procured prior to the termination of his agency. The case presented no claim for damages arising from the non-receipt of premiums prevented by insolvency, but the language and reasoning of the court is against the validity of any such claim. This is apparent from the prevailing opinion by judge DANFORTH, who (*see page 445*) says: "The contention of the plaintiffs' counsel is, therefore, against the plain language of the agreement, when he argues that commissions were to be paid Fleischl only on premiums actually collected and paid to the society by him. The commis-

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sions, by whomsoever the premiums are collected, are to be paid by the society to Fleischl as due of business obtained by him or his agents. He acquired a right to them the moment a policy was issued; payment, however, depends upon their collection by the company through him or some other person — as to that he takes the risk — but so long as the premiums are paid to the company, he is entitled to his commissions. * * * For ought that appeared upon the trial the policies were still alive, and renewal premiums paid. Whether this was the case or not was known to the plaintiff, and could not be known to the defendant, and the burthen was thus upon the plaintiff to show what, in this respect, the fact was. In the absence of all evidence, the presumption is in favor of the existence rather than the lapse and cancellation of a policy.”

Perhaps the extract from the opinion of judge DANFORTH just given, needs no explanation to show its application. It may be proper, however, to add, that the plaintiff's point in the case referred to, that when the agent was discharged his right to commissions upon renewal premiums ended, because the agent would no longer collect them, was overruled. The court held, no matter by whom such premiums were collected, so long as the company received them, entitled the agent to his commissions; but it was also further decided, that his right to such commissions depended upon the collection of the premiums “by the company through him or some other person — as to that he takes the risk — but so long as the premiums upon the policies are paid to the company he is entitled to his commission.”

The case is clearly decisive of the point under consideration. No contract can be made for parties differing from that which they make for themselves. By the terms of those made in the present instance, the parties performing the service elected to receive as a compensation therefor not a gross sum, but a per centage upon premiums actually received. Unless such premiums were actually received, by the provi-

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sions of the agreements, nothing was due. That they have not been paid, and never will be, was conceded, and as the act of the state in ending the corporation's life gave to those claimants no cause of action for a breach of contract, it follows that the non-payment of premiums, because of the corporate dissolution, gave to them no right of action to recover damages on account of such non-payment, which the death caused.

The same reasoning reaches the claims made for damages on account of future business, which could not be done by reason of the failure of the company. With the ending of the corporate existence the contract also terminated, and no cause of action for such termination survived to the plaintiff. There being no right to continue the service, there can be no future earnings; and as the prohibition to continue the corporate business must prevent the obtainment of other policies of insurance, there cannot possibly be an allowance of damages based upon the possibilities of future earnings, which it is plain can never be made.

The report of the referee upon these two claims are sustained, and the exceptions taken thereto are overruled. To prevent any confusion growing out of the alleged want of power in the referee to decide the questions involved, the order to be entered must affirmatively disallow and reject the claims.

SUPREME COURT

PEOPLE *ex rel.* FRANK R. SHEERWIN agt. MICHAEL L. MEAD.

Appeal to court of appeals — Stay of proceedings — Code of Civil Procedure, sections 2045, 2046, 2061, 2062 — How stay obtained under these sections.

A relator for a *habeas corpus* who is remanded to custody on a bench warrant, and desires a stay under sections 2045, 2046, 2061, 2062 of the Code of Civil Procedure, pending an appeal to the court of appeals, must himself personally execute the recognizance within the jurisdiction of the court.

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THE relator Sherwin appealed to the court of appeals and asked a stay pending the appeal. On presentation of the recognizance he had not signed it. Mr. Tremaine claimed the Code did not require that he should do so, and stated he was in London. Mr. Moak objected and claimed he was required to do so, and that when he did so he must be in this state within the jurisdiction of the court. Mr. justice BRADY, after holding the papers for several days for examination, decided: "I think, in this matter, that the relator must unite in the recognizance. He must be within the jurisdiction of this court to comply with its mandates in order to get this appeal perfected."

NOTE.— This is a further proceeding in *S. C.*, ante, p. 41-50.

SUPREME COURT.

SOPHIA A. KINNAN, executrix, &c., agt. EGBERT GUERNSEY, executor, &c., and others.

Deed of settlement— Terms of — Power granted ample to justify the done thereof by will, to charge the trust estate with the paying of her debts — Absolute power of disposition embraces everything necessary to carry it out effectively.

Edgar H. Laing, by a deed of settlement executed in 1846, settled the rents and profits of certain property upon his wife Sophia for life, and, upon her decease, "then upon trust to convey and transfer said premises to such person or persons and in such manner as the said Sophia, by her last will and testament, * * * which she is hereby authorized to make and execute, may direct, limit or appoint." She, in 1876, executed her last will, reciting, among other things, that her mother had recovered a judgment against her for \$25,000, and referring to a contract entered into by her, "in and by which I also bind myself to pay and discharge the said judgment of my mother. * * * Now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of my principal as may be found necessary to carry out said agreement." She gives her residuary estate to her executors in trust, after paying all debts.

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Held, that the mother of the testatrix, referred to above, is entitled to have the estate and property embraced within the deed of settlement, and referred to in the will, applied by the executor and trustee under the will to the payment and satisfaction of the judgment.

Special Term, October, 1882.

Evarts, Southmayd & Choate, for plaintiff.

Charles Francis Stone and John K. Porter, for defendants.

VAN VORST, J. — The deed of settlement of the 4th day of May, 1846, executed by Edgar H. Laing to James M. Cobb, in favor of Sophia V. D. Laing, the wife of the settlor, by which the rents, issues and profits of the property and estate, described in said deed, were limited to her use for life, contained a clause in the words, "and from and after the decease of the said Sophia, then upon trust to convey and transfer the said premises to such person or persons, to such uses and purposes, and in such manner as the said Sophia by her last and will testament, or by any instrument in the nature of a last will and testament, duly made and executed by her, in the manner in which wills of real estate are or may be required to be executed, and which the said Sophia is hereby authorized to make and execute, may, whether *sole* or *covert*, direct, limit or appoint."

Sometime after the execution of the deed, Edgar H. Laing, the settlor, died, leaving his wife, Sophia, him surviving, the deed, however remaining in full force. The widow of the settlor afterwards intermarried with J. S. Reynolds.

In November, 1872, Mrs. Reynolds made and executed her last will and testament, in and by which, amongst other things, she says and declares:

"Whereas my son, Alexander K. Laing, has recovered a judgment in the supreme court and a decree in the surrogate's court against me, amounting in all to over three hundred thousand dollars, and there is another judgment, in favor of my mother, against me for the sum of twenty-five thou-

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sand dollars and over; and whereas I have, on the advice of my friends, entered into a contract, dated July 20, 1872, between myself, Augustus W. Nicoll, my present trustee under said trust deed, and my son, Alexander K. Laing, by which said Alexander K. Laing agrees to take one hundred thousand dollars in full satisfaction of his judgment, and by which I and my trustee agree to pay the same, and in and by which agreement I also bind myself to pay and discharge the said judgment of my mother; and whereas an application is about being made to the supreme court for leave for my trustee to apply so much of the principal of the trust estate as may be necessary to carry out said contract. Now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of the principal as may be found necessary to carry out said agreement, whether the same shall or shall not be confirmed by the court."

And afterwards, in her will, the testatrix provides as follows :

"*Third.* All of my remaining estate, real and personal, including the trust estate, which I am so authorized to dispose of by will, I give, devise and bequeath unto my said executor and trustees, in trust, after paying all debts, and funeral and other expenses."

After making her will the testatrix died. This action is brought by the mother of the testatrix, who is the plaintiff in the judgment for twenty-five thousand dollars and over, referred to in the above extract from the will of the testatrix, in which she seeks to have the estate and property embraced within the deed of settlement, and referred to in the will, applied by the executor and trustee under the will, or so much thereof as may be necessary for the purpose, to the payment and satisfaction of the judgment.

Whether or not the plaintiff is entitled to the relief which she seeks in this action, depends upon the fact as to whether the testatrix was empowered by the terms of the deed of

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settlement to authorize and direct, by her last will and testament, the application of the settled estate to such a purpose, and if so whether she has clearly directed such application.

In making her testamentary disposition in this regard the testatrix was plainly acting, as she supposed, in pursuance of the power to appoint created by the deed. Her reference to that instrument in her will, and to the authority she possessed under it, makes the matter sufficiently plain.

But whatever may have been her purpose, the validity of the disposition which she in the end made is to be tested by the extent of the power actually conferred upon her. The power is general and beneficial (1 *R. S.*, 732, sections 77, 79; *Cutting v. Cutting*, 86 *N. Y.*, 531). Notwithstanding such be its character, still it must be exercised in substantial accord with the authority granted, and with the formalities required by the power conferred. With regard to the latter requirement, the form chosen by the donee of the power is such as she was authorized to adopt, in disposing of the estate held in trust, and she could have adopted no other method of appointment than by her will and testament.

The question arises, has the testatrix by her testamentary disposition gone beyond the power and devoted the estate to unauthorized uses or purposes?

It is claimed, in substance, by the learned counsel for the defendants, that the donee of the power could only direct by will to whom or to what uses the trustee under the settlement should convey the estate; and that the will attempts to charge the estate settled with the judgement in question; and that its payment will involve a sale of the same by the trustee; and that there is no authority thus to charge the estate or to create a power of sale for such purpose.

I consider the power of disposition of the trust estate by the donee, through a last will and testament, to be in effect absolute and unlimited. She is authorized to limit and appoint the same to such person or persons, to such uses and purposes, and in such manner as she may elect. That I take to be the

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substance of the power, and makes it both general and beneficial. The legal relation of the trustees under the settlement, however, in truth terminated with the death of Mrs. Reynolds, the tenant for life. The trustee, after that event, had no further active duties, unless the conveyance of the estate by the trustee to such uses and purposes as the donee might appoint should be regarded as such; but such act, if necessary, can hardly be placed in the category of active duties; for at the death of the tenant for life her testamentary disposition became effective and carried the substantial interest, by force of the power, to the use and object to which she had appointed it, and such appointee, as a beneficiary under the will, is in a condition to maintain an action to compel the application of the settled estate in his favor according to the appointment of the testatrix and as fully and completely as she intended.

I consider it quite clear that the power granted is ample to justify the donee thereof, by will, to charge the trust estate with the payment of her debts, and as a result, whatever is necessary to legally effect that result, although it should involve a sale, may be done.

There is sufficient in the case to show that, although the judgment was recovered against Mrs. Reynolds, as executrix, she was legally and equitably bound to pay it. The estate of her deceased husband, which was ample for the purpose of discharging his debts, was suffered to be wasted, and there was not sufficient assets remaining in her hands to discharge this demand, and hence she became personally liable. And the evidence is sufficient to justify the conclusion that she regarded herself as so liable.

In the agreement of the 20th day of July, 1872, entered into between Mrs. Reynolds, her son, A. K. Laing, and Augustus W. Nicoll, which made an adjustment of certain liabilities in favor of A. K. Laing against his mother, she, amongst other things agreed to save him harmless, and protect him against this judgment, and in fact to satisfy and dis-

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charge the same. And this result she intended to reach through the disposition made in her last will and testament, by making it a charge upon and payable from the estate which she was authorized to appoint in the manner above mentioned.

It can furnish no reasonable ground for complaint in a court of equity, that the donee of a general power to appoint an estate, should execute the power in favor of her creditors. Their claim is moral as well as legal.

The clause in the will limiting and appointing the estate to such purpose, refers directly to the clause in the agreement of settlement between herself, son, and trustee, of the 20th day of July, to which reference has been made above, and to an intended application to the supreme court to ratify and confirm the same, but the terms of the agreement were by her will confirmed fully, whether the same should or should not receive the approval of the court.

The agreement itself, by its terms, adopts as a personal obligation the debt as one for which the testatrix was bound, and its payment is assumed; and the will in legal effect charges it upon the settled estate, and authorizes its discharge therefrom.

It is quite true that by the strict terms of the power the trustee is directed to convey and transfer the estate to the persons, the uses, and in such manner as the donee should limit and appoint.

Having reference to the substance of the power, which is unlimited as to the direction to be given to the property by the donee, save that it should be done through a will, it would be an exceedingly narrow construction which would forbid a sale to satisfy the judgment. The absolute power of disposition, it seems to me, would embrace everything necessary to carry it out effectively.

The authorities to the effect, that under a power to appoint or direct the division of real estate to or among a particular class of persons, the donee can neither sell nor direct a sale of real estate, but can only appoint it specifically to or amongst

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the persons designated, do not affect the power under consideration.

In the case of a special power in trust, its execution must be confined within the limits imposed, and when the power is to appoint land specifically to or among certain persons, who are designated, its conversion into personality, through a sale by the direction of the donee of the power, would not be a legal execution of the power.

But when we reach the conclusion that the power is general, and beneficial, and may be exercised in favor of the creditors of the donee, there is of necessity embraced in such conclusion the taking of every step necessary to give effect to the appointment, which would include a sale of the property if necessary.

There must be judgment for the plaintiff, the details of which appear by the findings of fact and conclusions of law which are filed herewith.

COURT OF APPEALS.

EMMA J. MASON agt. LYDIA C. LIBBEY.

Resulting trust — True doctrine at law, in equity and in favor of creditors — Offer to prove contents of letter lost or destroyed — Rule as to admissibility — Question as to loss or motive for destruction, one of fact.

Where plaintiff sued her mother to recover property real, leasehold, and also the proceeds of such real property sold by defendant, alleging that it was formerly the property of her father, because purchased with her mother's earnings, to which her father had the legal right by virtue of his sustaining the relation of husband to defendant:

Held, first. "The doctrine that by marriage the defendant's property vested in her husband, and that after marriage her earnings belonged to him," though applicable "at law and in favor of creditors," yet "in equity it has been otherwise."

Second. "And it is impossible to see how a mere volunteer can derive from it any support in a prosecution which, if successful, would defeat a legal estate acquired with the husband's consent."

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Where, in a trial involving the issue as to whether or not the defendant sustains the relation of trustee to plaintiff, and in respect of property described in the complaint, a witness on the stand testifies that he received a letter from defendant in reference to the property, "but the court have no means of knowing either the contents of the letter or the answer which was expected from the witness; but assuming that the answer would have been pertinent to the issue, it was for the court to determine, in the first instance, whether the evidence established that the letter was destroyed, and also that its destruction was not to produce a wrong or injury to the opposite party, or to create an excuse for its non-production."

December, 1882.

APPEAL by plaintiff from a judgment of the general term, first department, dismissing her complaint upon the merits. The facts as they appear from the pleadings and testimony are as follows:

The plaintiff is a married daughter of the defendant. Her maiden name was Emma J. Heath; she was born in 1845; her father being Lurad C. Heath, who died in May, 1873. After his death, and on the 6th December, 1873, her mother, the defendant, married John Libbey.

The defendant was married to her first husband, Heath, in 1831, in the state of Maine. She had then some property of her own, and after her removal to New York, she carried on a light dry goods business, in Grand street, for about eighteen years. The plaintiff was the only child of the marriage, and was born thirteen years after the marriage of her parents. During this period, her mother managed the business with care, and saved up her money, but the father seems not to have been successful in his enterprises.

On the 25th May, 1844, a house and lot in East Tenth street, New York, was conveyed to Mr. Heath, and, on the 16th of May, 1850, the same property was transferred by him to the defendant, a deed being first made to one Norman G. Hard, who conveyed to defendant.

The complaint charged that this property was so conveyed in trust for the plaintiff.

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On the 30th of November, 1844, a house and lot in Eleventh street was conveyed to Mr. Heath, who, on the 24th of August, 1853, conveyed it directly to the defendant.

The complaint charged that this conveyance was also made in trust for the plaintiff, and that unless so declared, it is void.

In August, 1851, a farm in New Jersey, of about forty-seven acres, was conveyed to Mr. Heath, who, on the 9th day of December, 1853, conveyed it to the defendant, but the deed was not recorded till 1855. In 1866, defendant contracted to sell this farm; the fact that the conveyance by Mr. Heath was directly to his wife was made an objection to the title, and he, in May, 1866, joined in his wife's deed, to cure that defect. His doing so is claimed in the complaint to have been, upon the trust, that the proceeds should be invested for the plaintiff's benefit, and she claims to follow such proceeds into a house in East Broadway, and some property in Brooklyn, subsequently purchased by defendant.

Upon the trial, the plaintiff abandoned her claim upon the Tenth and Eleventh street houses, and limited it to the proceeds of the New Jersey farm.

Mr. and Mrs. Heath went to live on this farm about 1852. She had given up the Grand street store, which was retained by Mr. Heath for a while, till he sold it out to a Miss Moody. Some time after 1855, the domestic happiness of Mr. and Mrs. Heath appears to have been disturbed. She was placed in an asylum for about two years. She had previously collected the rents of her property, but Mr. Heath then got an order for their collection drawn up by the person to whom he sold out his store, and who helped him take his wife to the asylum. When she was released, she resumed the management of her affairs. Mr. Heath was annoyed by creditors, and went south, leaving her to manage the farm alone.

The plaintiff had been at boarding school four years, from about 1859 to 1863. In 1866, Mr. Heath appears to have been living near Washington, part of the time at City Point.

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The general state of things is shown by a letter from defendant, put in evidence by the plaintiff, the only piece of written evidence directly bearing on the point in controversy, and it is upon an alleged trust in her favor, which, she says, her father imposed as a condition to joining in the deed spoken of in this letter, which perfected the title to the New Jersey farm, that the plaintiff based her action. This rests entirely upon her own evidence, which was contradicted by her mother.

Plaintiff undertook to give supplementary evidence of this alleged trust by conversations with her mother, testified to by herself and by her husband, Sumner A. Mason, and some slight evidence by his cousin, Mrs. Boyd. The witness, Sumner A. Mason, was a medical student, living with plaintiff's father at City Point in the fall and winter of 1866-7, after deed of the New Jersey farm. Plaintiff made his acquaintance there, on a visit to her father, and an intimacy grew up between them, followed by an engagement, then by a clandestine marriage before a justice of the peace at Portchester in the summer of 1869. A public ceremony took place in Plymouth Church, Brooklyn, in November following. During the engagement, defendant had advanced money to Dr. Mason, to aid in his medical education, and he testifies to a good deal of general conversation as to what she would do for Emma upon their marriage. At one time, it was proposed to settle in Philadelphia, and property was examined there, but defendant testified that in none of these conversations was there anything more than a consultation of the wishes of her daughter, on the assumption that wherever defendant might conclude to establish her home, her daughter, with her husband, would live with her.

After December, 1867, defendant settled in Powers street, Brooklyn, in a house purchased by her in that month, and about that time her absent husband returned and lived in the same house, supported by her, for three or four years, until about August, 1871, when he went to live with the plaintiff

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and her husband in New York, the plaintiff having left her mother's house to join her husband in the spring following her marriage, the spring of 1870.

After the plaintiff's marriage and settlement in New York, defendant contributed largely to her support, allowing her regularly \$1,800 a year, in monthly payments, besides other assistance.

It was not until after the death of Mr. Heath, and the ceasing of pecuniary allowances from her mother, that plaintiff commenced this action in May, 1874.

The case, in its general features, is an attempt by plaintiff, aided by her husband, to compel her mother to hand over, in her lifetime, the accumulations of her industry and frugality.

No legal right to the remedy claimed is pretended.

The alleged equitable right upon which the complaint was framed, that the property standing in defendant's name was not hers, but was placed in her name upon some trust, is abandoned.

All that was then left of plaintiff's case was the obligation supposed to flow from the promise which it is alleged was enacted from her, as a condition upon which plaintiff's father joined in a deed, which he was in equity bound to give.

This promise rests purely on oral evidence, which was conflicting, and the weighing of which involved questions of credibility as well as probability, and the decision was adverse to plaintiff's claim.

The general term affirmed the judgment of special term and plaintiff appealed to the court of appeals.

Alexander Cameron and *Samuel Hand*, for the appellants, made and argued the points following:

I. The money with which the New Jersey farm was bought belonged to Lurad C. Heath.

II. The title was taken by the husband. If the purchase money had come from defendant, the land would have been his.

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III. The deed from Heath to his wife was void.

IV. The condition imposed by Heath in the deed to John Taylor Johnston was sufficient.

V. Plaintiff may show real nature of transaction by parol.

VI. The refusal of the judge to show the contents of the letter was error (9 *Wheat.*, 483, 487; 70 *N. Y.*, 280; 27 *Am. Decs.*, 126; 2 *Cov. and Hill's Notes*, 516, ed. of 1859).

VII. Denials of defendant are not equivalent to positive statements of plaintiff.

VIII. It is natural for the insane to hate their best friends (*Dr. Wm. A. Hammond, Diseases of the Brain*).

IX. The case should have been opened to let in additional testimony.

On behalf of defendant, *Chauncey B. Ripley* and *Stephen P. Nash* submitted the points following :

I. The entire foundation of plaintiff's equity, as laid in the complaint, was abandoned on the trial. That equity rested on the allegation that the Tenth and Eleventh street houses, which were the chief source of defendant's revenue, were held by her in trust for her husband, the plaintiff's father, and herself. The complaint charges, however, that defendant claimed that these properties were, as the deeds indicated, her own. Plaintiff gave no proof to sustain the allegations that the properties did not jointly belong to the defendant, and the evidence shows that they were the fruits of her own industry.

II. If the Tenth and Eleventh street houses belonged to the defendant, the evidence shows that the New Jersey farm was paid for by the money coming from these houses. The farm cost only \$3,250, of which \$1,600 was paid in cash by defendant, and mortgages assumed for the residue. These were subsequently discharged from the rents of the Tenth and Eleventh streets houses. There was no evidence to contradict this; no evidence to show that Mr. Heath ever paid a penny toward the cost of the New Jersey farm. He made the deed of it to his wife in 1853. He had her put in the

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asylum in 1859. He left her in 1863, and in 1866 the farm was sold for \$10,700. This increase in value belonged to the owner of the property, who must on the evidence be considered the defendant. There is no evidence that her husband, by any acts of his, added anything to such value.

III. Plaintiff's case then is, that defendant's husband, having the naked power to refuse to confirm the sale made by his wife of her own property, but without any equitable right so to refuse, exacted as a condition of having what she had a right to demand, that she should agree to invest the proceeds for the plaintiff's benefit. This alleged exaction by him, and promise by the defendant, rests upon the unsupported testimony of the plaintiff, contradicted by the defendant, and was properly found by the judge at special term, not proven.

IV. Such an agreement, if proved by oral evidence only, could not impress a trust upon real estate held by a title absolute in its terms, nor, if executory, be enforced (2 *R. S.*, 134, § 6; 137, § 2; *Cook agt. Barr*, 44 *N. Y.*, 156; *Sturtevant agt. Sturtevant*, 20 *N. Y.*, 39). The exception to this rule is where the holder of the title holds it in fraud of the true owner, either from having taken it wrongfully or upon a trust which he repudiates (*Ryan v. Dox*, 34 *N. Y.*, 307). This cannot be said to be the case here, if defendant was the true owner of the farm. She was such owner, if it was paid for with her own money, and that this was so is hardly disputed.

V. The conflicting testimony was all carefully considered at the trial term. There is no ground for reversing the conclusion there reached, and the judgment should be affirmed, with costs.

DANFORTH, J.—Upon the pleadings, the issue was one of fact, whether there had been a declaration of trust, or rather whether the premises described in the complaint were held in trust for the plaintiff. The defendant was her mother, and considerable testimony was given of casual and loose conversations for the purpose of establishing the plaintiff's demand; yet, if that testimony stood uncontradicted, it would scarcely

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create a belief that the defendant at any time sustained the character of trustee in relation to the property or ever held herself out in that light, or as other than its actual owner. Indeed, at the conclusion of her testimony, the plaintiff's counsel abandoned all claim to an important portion of the property, and to another portion before the close of the trial. As to the rest, the defendant so overcame the plaintiff's case by contradictions and independent statements that the learned trial court was not led to the conclusion that the defendant was either in fact a trustee or that she had at any time declared herself to be a trustee of any of the real or personal property described in the complaint, and as to which judgment was demanded. On the contrary, he found that, as to the property on Tenth and Eleventh streets, the plaintiff had offered no evidence, and as to that and the rest of the property, the title was in the defendant, and moreover that for part of it the price was paid from her earnings and title taken in her name, with the approval of her husband; and from this it followed that neither at law nor in equity had the plaintiff any estate or interest in the premises in question. Against this conclusion the appellant struggles in vain, for her contention has no better foundation than the doctrine that by marriage the defendant's property vested in her husband, and that after marriage her earnings belonged to him. At law and in favor of creditors there are no doubt cases where this doctrine would avail, but in equity it has been otherwise, and it is impossible to see how a mere volunteer can derive from it any support in a prosecution which, if successful, would defeat a legal estate acquired with the husband's consent.

Upon every question involved in the merits of the case we entirely agree with the learned trial court, and in the views expressed in its opinion.* It is, however, said by counsel

*For opinion of VAN VORST, J., see *Mason agt. Libbey*, special trial term, reported 54 *How. Pr.*, 104-112.

The general term decision is reported in 19 *Hun.* 119-127. Judgment of special term affirmed on opinion of the learned judge below.

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for the appellant, that the trial judge erred in excluding certain evidence offered by her husband in her behalf. He testified to an acquaintance with the defendant commencing in 1866; that he had conversations with her in 1866 and 1867, "in reference to property," and which, as detailed by him, were of the most general and unimportant character; that he had correspondence with her "continually." "I had," he says, "one letter in two weeks," and remembers receiving one in the fall of 1867. These letters he destroyed in 1868, as he was about leaving Philadelphia for New York. He says: "I tore them up and burnt them, because I didn't want to encumber my baggage with such a large pile of letters." Asked, "Did you have any idea that those letters were of any importance," says, "No, it never occurred to me that they were of any importance." "Did you give the matter of the destruction much consideration." Answers, "Not in the least." Did you have any other reasons for destroying them except what you have stated? Answers "No." Being again asked, "Did you receive a letter from Mrs. Heath" (the defendant), "with reference to the property?" Answers, "I did." Q. "And destroyed it under the circumstances mentioned." Answers, "I did." He was then requested to state the substance of the letter, and upon objection by the defendant's counsel, it was excluded.

We have no means of knowing either the contents of the letter, or the answer which was expected from the witness, but assuming that the answer would have been pertinent to the issue, it was for the court to determine in the first instance whether the evidence established that the letter was destroyed, and also that its destruction was not to produce a wrong or injury to the opposite party, or to create any excuse for its non-production (*Jackson agt. Frier*, 16 *Johns.*, 198; *Stephen's Digest of the Law of Evidence*, art. 72). This is so whether the paper was destroyed by a party (*Riggs agt. Taylor*, 9 *Wheaton*, 483; *Steele agt. Lord*, 70 *N. Y.*, 280; *Blade agt. Nolan*, 12 *Wend.*, 173), or a witness (*Livingston agt.*

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Rogers, 2 Johns. Cases, 488), and the sufficiency of the explanation presented a question of fact for the trial judge which this court cannot review (*Steele agt. Lord*, 70 *N. Y.*, 280-283).

The judgment appealed from should be affirmed.

All concur, except TRACY, J., absent.

N. Y. COMMON PLEAS.

GEORGE HUTSON *et al.* agt. THE MORRISANIA STEAMBOAT COMPANY.

Promissory note — Domestic corporations — Code of Civil Procedure, section 1778 — Necessity of defendant serving with his answer copy of order of judge directing that the issues presented by the pleadings be tried — Effect of neglect to serve such order.

In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, &c., * * * unless the defendant serves, as required by section 1778 of the Code of Civil Procedure, with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of the complaint.

The service of a copy of such an order is not restricted to cases where the defendant's corporation has asked for and obtained an extension of time to answer or demur from this court, but it is necessary in all cases.

General Term, November, 1882.

Before VAN BRUNT, BEACH and DALY, JJ.

Four actions were commenced on promissory notes made by the defendants, a domestic corporation, created under the laws of the state of New York.

At the time of the service of the answers no order was obtained, under section 1778 of the Code, permitting the issues to be tried by a jury.

The plaintiffs moved for judgment for want of the required

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order at a special term of the marine court, and the motions were granted, and the following opinion was delivered :

HAWES, J. — The allegation in the answer that there was some mistake in computation when the notes were made is clearly frivolous. The further allegation of payment, however, to the amount of \$250, is an issuable fact, and although pleaded in an equivocal way is, I think, sufficiently definite to warrant its submission to a jury (*Strover agt. Ocean Ins. Co.*, 2 *Hilt.*, 475). Its falsity as a fact is not so decisive as to bring it within the decisions affecting sham answers. The defendant corporation, however, has not complied with section 1778 of the Code, requiring an order to be served with the answer. The plaintiff is entitled to judgment under that section ; and while I have no doubt that he could enter up his judgment without application to the court, yet I am not justified in declining jurisdiction in the interpretation of the statute, as it is new, and the practice under it is as yet undetermined.

The provisions of the Revised Statutes affecting this subject (*chap. 8, title 4, art. 5, sec. 8*), authorized the plaintiff in an action against a corporation founded on a note or other evidence of debt to apply to the court for judgment on the return day, and the court then rendered judgment in favor of plaintiff, unless it was made to appear that the corporation had a good and substantial defense on the merits. Section 1778 of the Code modifies this statute in conformity to the Code practice, and makes it incumbent on the defendant corporation to establish such *prima facie* proof of merits by procuring from the judge an order directing that the issues presented by the pleadings be tried, and in case such order is not obtained and served, the section provides that the plaintiff may enter up his judgment in the same manner and with like effect as if no answer had been served, and consequently no application to the court is necessary.

The provisions of section 1778 clearly intended to prevent

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corporations from interposing dilatory pleas by compelling them to obtain from the court an adjudication of the meritoriousness of their defense, and when not obtained it virtually declares the answer a nullity, and directs plaintiff to take judgment with like effect in like manner, as in case of default in its service. An order will be entered directing judgment for the plaintiff in the four actions, but as plaintiff could have taken judgment without application to the court, no costs of these motions will be granted.

An appeal was taken to the general term of the marine court, and the judgments there affirmed in an opinion as follows:

NEHRBAS, J.—These actions are similar, all having been brought on promissory notes made by the defendants. The defendants being a corporation duly organized under the laws of the state of New York, had failed to serve a copy of an order of a judge, directing that the issue presented by the pleadings be tried, as required by section 1778 of the Code. Judgments were thereupon directed in favor of plaintiffs in each case.

It is not pretended that such an order was ever procured on defendants' behalf. Counsel insisted that the requisite of service of a copy of such an order only applies in cases where the defendant corporation has asked for and obtained an extension of time to answer or demur from the court. How the section referred to can be strained to admit of such an interpretation it is difficult to conceive. "In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note," &c., &c. "*In such an action*, unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge," &c., &c. What else can the words, "*in such an action*," refer to, but an action on a promissory note, so far as this appeal is concerned.

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No relief can be afforded defendants on this appeal, inasmuch as it is absolutely without any merit.

Judgments in the four actions affirmed, with costs.

An appeal was taken to this court.

T. C. Cronin, for appellants.

First. The case in which the order is required by section 1778, is the one mentioned in the first paragraph, where the time to answer or demur has been extended. "In such an action," are the words of the Code in the second paragraph—that is, where the time to plead has been extended, an order for the trial of the issues must be obtained. (a.) This is the only reasonable view to take of the section. The time having been extended to demur or answer, then, on the examination of the motion papers and the delayed pleading, the order is required so as to prevent any further delays and to show good faith in obtaining the extended time. This is also obvious from the intent of the legislature to protect the plaintiffs, by requiring a notice of motion to extend the time to plead, and of course the affidavits stating and giving the grounds of application. (b.) The court will not presume that the legislature intended to deprive a defendant of the right to a trial, by jury or otherwise, where his pleadings present an issue of fact, and when he is asking for any favors of delay or otherwise. (c.) The eighth section of the Revised Statutes (2 R. S., 458) protects the rights of the parties, as it requires papers and facts to be acted on in granting or refusing, and thus preserve the right of appeal, and requires only that the pleading shall be a good one—that is, it presents a defense. If the trial is refused, an appeal has a basis. In this case, it is conceded that the answer presents the good defense of part payment.

Second. The construction now claimed of section 1778 by the respondent deprives the defendant of a constitutional right—that is, of the same and equal rights in the courts of other defendants, who may present good defenses in their

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pleadings and the right of appeal where a trial and hearing is denied. (d.) The legislature did not intend to place arbitrarily the power absolute and unconditional upon a judge to grant or refuse a trial to a party, and thus tyrannically depriving him of all rights, not of a hearing alone, but of appeal also. Upon what shall the judge direct the issues presented by the pleadings to be tried? Shall it be on his own unguided will, on his own whim and caprice? What papers are to be before him? He has nothing but the pleadings, according to the respondent's construction. He can refuse orally. No appeal can lie from the oral refusal. It's much more reasonable to believe that the legislature intended that in the cases only where the time to plead had been extended on motion, Then the court can see by the examination of the motion papers that the party has rights to protect or not, and review the action of the judge. Then the court has a record before it to exercise the judgment of discretion on, as under the Revised Statutes. (e.) By the respondent's construction, the most unreasonable practice is claimed, depriving parties of absolute rights and the most intolerable and destructive of the rights most sacred to parties. Without requiring the slightest ground of statement, affidavit, examination or other judicial act, the unrestricted, undefined and absolute right is given a judge to prevent the sworn issues of a pleading from being tried, however good the defense. No appeal can lie from the refusal order; no foundation is laid for it by the Code, and no requirements of statement, oral or written, are suggested even. (f.) It's absurd to say that such a construction will be placed on the section, when the reasonable one of connecting both paragraphs together gives the record to act upon, and the right of appeal, founded on the record and open to review, and gives every step of consistent practice which preserves the rights of parties (*Wayland* agt. *Tylen*, 45 *N. Y.*, 281).

Third. If no other reason existed for appellant's views, the one taken by the respondent in the first point on this appeal

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ought to be sufficient to sustain the appellants. (g.) There it is now gravely claimed, that as no order for the gracious privilege of a trial was obtained, though issues by pleadings were made, and although a motion is made and heard on affidavits and an order and judgment granted on the opposed order of the court, yet, that the judgments are by default, and cannot be appealed from under section 1294 of the Code. The statement is enough, and answers fully the consequences of so bold and unreasonable a construction of section 1778, as respondents claim.

Fourth. The affidavits show the defendants have a good defense. (a.) Now in order to save the plaintiff's order, they claim that the motion denied them ought to have been granted, that is, for judgment on a sham answer; and that the judgment is by default, and the order is not appealable though granted on a long contest in the court below on pleadings and affidavits. Verily the days of legal wonders have not ceased with the new Code. The order for judgment should be reversed, and the judgment also. The cases should be tried before a jury, and then the rights of parties can be protected. (b.) Suppose the court should refuse to grant an order for a trial to be served with the answer, what will the defendant appeal from? There is no order to appeal from. There is no method of bringing the question up for review. How can a remedy be given? What's the remedy? *Mandamus*, or prohibition? What shall constitute the papers on appeal? Shall the oral refusal of the judge applied to for the order? How is the entry of judgment to be prevented, and the destruction of corporate rights that follow it, and the execution? There is but one remedy; there is but one solution of the absurd position of the respondent's construction. It has been stated. That is, make the affidavits on motion for the extended time the grounds of appeal. In such cases where the time has been extended, the court's relief from the rather obscurely worded section 1778 will follow.

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James McKeen, for respondents.

First. The section is not unconstitutional. (a.) Corporations being creations of legislation, special regulations as to the conduct of suits by and against them, always have been, and must be proper and necessary. Their right to sue, and their subjection to being sued, is in no way impaired by such special regulations. (b.) The provisions of section 1778 are enacted as a substitute for similar requirements in the Revised Statutes (2 *R. S.*, page 458, *secs.* 8, 9 and 10). Section 8 authorized the plaintiff in such action to apply for judgment on the return day of process; and section 9 provided: "On such application, the court shall render judgment for the plaintiff as by default; either interlocutory or final, or both, as the case may require, unless it shall satisfactorily appear to such court that such corporation has a good and substantial defense upon the merits, which shall be disclosed by affidavit." (c.) Defendants have no "vested right" in any special method of defense. It is unquestionably in the power of the legislature to make radical changes in procedure. But, in point of fact, in these cases all the notes were made after section 1778 had become law. Nothing in the section, therefore, operates upon any pre-existing *status*, so far as these defendants are concerned. (d.) This section differs from the Revised Statutes in requiring a preliminary censorship of the plea by a judge. No power, directly or by any implication, is conferred on the judge arbitrarily to deprive the defendants of a trial. If he should err by refusing an order the refusal would be remediable like other judicial errors. In these actions there has been no refusal. No exception to any such ruling is in the records. The defendants are here on naked appeals from judgments. (e.) The hypothetical suggestions of the wrong which might be done by an arbitrary and obstinate judge are out of place. In any case it might be as well claimed that the power of the court to order nonsuit or to direct a verdict deprive parties of jury trial. The conferring of such powers and the imposition of such requirement

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to save default, are constitutional, even where conferred and imposed subsequent to the constitutional guaranty (*Hunt agt. Lucas*, 99 *Mass.*, 404). This was a case in which a statute is sustained, which was passed after the adoption of the Massachusetts Constitution, and which authorizes a judgment by default, notwithstanding a good plea, unless a prescribed affidavit of merits be filed (*Naugatuck R. R. Co. agt. Waterbury Button Co.*, 24 *Conn.*, 468). In this case power to nonsuit had been enlarged by a subsequent statute. Assuming, for purposes of argument, that the issue made by the answers was such as to entitle the defendants to trial, it is not the statute which has deprived them of that right, but their own failure to comply with it.

Second. The answers are frivolous and sham. No meritorious defense is disclosed by the answers or the defendants' affidavits. (a) We concede the difficulty of getting summary judgment on these grounds since the decisions of the court of appeals (*Wayland agt. Tysen*, 45 *N. Y.*, 181, and *Thompson agt. Erie R. R. Co., Id.*, 468). The frivolousness must be apparent, without argument, on a bare inspection. This is true of these answers, unless as to the alleged part payment (*Manuf. Nat. Bank of Amsterdam agt. Russell*, 6 *Hun.*, 375). There is no general denial in the plea. The court of appeals cases (*supra*) only held that a general denial to all or part of a complaint cannot be disposed of without a trial. They leave unchanged the doctrine that an affirmative defense may be struck out, if sham (*People agt. McCombe*, 18 *N. Y.*, 315, 324). And where a defense, as here, is alleged "on information and belief," it may be struck out (*Kay agt. Whittaker*, 44 *N. Y.*, 565, 573; and see *Newberger agt. Webb*, 24 *Hun.*, 349). The plea is utterly defective. "The defendant, in answer to the complaint herein, says that they deny that the said note in said complaint is due and unpaid, and allege that the same has been paid in part, and that the sum of \$250 or thereabouts has been paid thereon, as said defendants are informed and believe,

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and charges the same to be true." And this is sought to be verified by a man who swears he is treasurer of the corporation. Moreover, what he refers to in his affidavit is the "foregoing complaint." This may have been a clerical error, but it is the kind of error which would be a convenient shelter in the event of a prosecution for perjury, such as judge GROVE in *Wayland agt. Tyen (supra)* advised should be instituted against those who verify false pleas. The same observation applies to the expression "says that they deny." A deponent cannot be convicted of perjury by such a form of denial (*People agt. Christopher*, 4 *Hun*, 85). The defendants had ample time to amend their answer, but never availed themselves of their right.

Third. The wisdom or expediency of the legislation embodied in section 1778 may be questioned, without affecting the constitutionality. The nature of the efforts made by this corporation to delay payment of its notes is an argument in favor of the wisdom of such provisions.

The opinion by BEACH, J., affirmed the judgment on the grounds stated in the opinion in the courts below.

A motion was made for leave to appeal to the court of appeals at the January general term of this court, 1883, and denied.

SUPREME COURT.

SAMUEL WEEKS *et al.* agt. JACOB WEEKS CORNWELL *et al.*

Will—Distribution under, impracticable and uncertain—When subject of trust attempted to be created, too indefinite to be enforced, and trust should be declared void.

The testator, who left no children, gave certain real and personal estate to his widow (who has since died) in lieu of dower, in which was included an estate for life in four houses in Fifth avenue. With the exception of four specific devises in fee, he devised certain portions of his estate to his executors for the use of various persons designated, during their respective lives, with a remainder in fee as to each portion.

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He then gave the residue of his estate, which comprised the Fifth avenue property, to his executors, with power to mortgage it, and, after paying taxes and other expenses, to divide the remainder, at any time within ten years, to the legatees named in his will (except his servants) in like proportions to their previously specified legacies. Eighteen specific devises of a life estate and remainder in fee, in several parcels of land in different localities, constitute the basis of the intended distribution.

Held, that though the provision giving the executors the right to mortgage the residuary estate and make distribution of the surplus of proceeds thus realized, within ten years, does not unlawfully suspend the power of alienation, yet, as in order to make division in the proportions named, the value of ninety-seven parcels of land must not only be ascertained, but also the value of the estate of each life tenant, and of the estate in remainder in fee, and also of such as may have died or may thereafter be born, such a distribution as is contemplated would be impracticable and uncertain, and the subject of the trust is too indefinite to be enforced, and the trusts should be declared void.

Special Term, January, 1883.

JACOB WEEKS died in the city of New York, September 9, 1881, leaving his widow, but no child nor issue of any child, him surviving.

By his will, dated May 9, 1881, which was duly admitted to probate September 20, 1881, he devised and bequeathed to his widow certain real and personal estate in lieu of dower, in which was included an estate for life in the premises, Nos. 750, 752, 754, 756 Fifth avenue, in the city of New York.

With the exception of four specific devises in fee, the testator specifically devised certain portions of his real estate to his executors upon trust to collect the rents, profits and income thereof during the respective lives of the *cestuis que trust* designated by the will, and after expending therefrom such amounts as would be necessary to keep the premises in good order and repair, and properly insured against loss and damage by fire, to pay the remainder of such rents as and when collected to the persons thus designated during their respective lives, with a remainder in fee as to each portion as by such will was devised.

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The testator made the following provision as to his residuary estate :

"24th. All the rest, residue and remainder of my estate, real and personal, that I may own at the time of my death, and not hereinbefore bequeathed in fee or upon trust, I give, devise and bequeath to my said executors upon trust, to use the same as in their judgment they deem to be for the best interest of my whole estate ; and, in order to raise money for that purpose, I empower them to mortgage the piece or parcel of land being the residue and remainder of my estate, and not hereinbefore disposed of in fee or upon trust, and after paying and keeping paid all taxes and assessments upon said property and expending such amounts as they may deem necessary to keep the said premises in good order and repair and properly insured against loss and damage by fire, to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named, except Ann Davey and Hugh Collins, in the proportion in which his, her or their specified legacies, hereinbefore named and bequeathed, bear to each other. The heirs of such legatees as may have died to take the share to which said legatees would, if living, have been entitled.

"25th. Upon the termination of the real estate trusts herein contained, where I have not hereinbefore disposed of the fee of my real estate, I do hereby give, devise and bequeath the fee of said real estate trust property to each and every one of my legatees herein named, except Ann Davey and Hugh Collins, to be divided among such legatees in the proportion in which his, her or their specified legacies, hereinbefore named and bequeathed, bear to each other. The heirs of such legatee as may have died to take the share to which such legatee would, if living, have been entitled, meaning and intending by this to regard each of my legatees, except Ann Davey and Hugh Collins, a legal heir to my estate, limited to the said trust property in the proportion named.

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"27th. I authorize and direct my executors to repair or rebuild the buildings upon any of the lots of ground herein conveyed to them in trust, if said buildings upon shall be partially injured or wholly destroyed by fire during the continuance of such trust, and, in order to raise money for that purpose, I empower them to mortgage the parcel or parcels of land upon which said buildings shall be situated, and I charge the payment of said mortgages upon the said parcels of land respectively.

"28th. I authorize and direct my executors to repair or rebuild the buildings upon any of the lots, or build upon any of the vacant lots herein conveyed to them in trust, upon the request, in writing, of the person or persons, or a majority of them, entitled to take under the provisions of any trust herein, and, in order to raise money for that purpose, I empower them to mortgage the parcel or parcels of land upon which said buildings shall be situated, and I charge the payment of said mortgages upon the said parcels of land respectively.

"29th. I authorize and direct my executors, if I shall die leaving any building or buildings upon any of the lots of ground hereinbefore devised in an unfinished state, or having executed any contract or contracts for the erection of any building thereon, to finish and complete or carry out the same, as the case may be, and for that purpose I empower them to mortgage the parcels of land upon which said unfinished buildings may be situated, or to which said contracts may relate, and I charge the payment of said mortgages upon the said parcels of land respectively.

"30th. I authorize and direct my executors that, immediately upon the proving of this, my will, or as soon thereafter as possible, they pay all taxes, assessments, mortgages, or incumbrances whatsoever against my said property, at the time of my death, out of my personal estate. If my personal estate shall be insufficient for the above purpose, I direct that any deficiency which may exist shall be paid out of the

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income of my entire estate, except the income from the property devised for life to my wife, Catharine Weeks.

"31st. I authorize and direct my executors to pay the annual taxes and all assessments upon the property herein devised to them in trust, out of the income thereof respectively, and I direct my wife to pay the annual taxes and all assessments upon the property devised to her for life.

"32d. I nominate and appoint my wife, Catharine Weeks, executrix; my adopted son, Jacob Weeks Cornwell; my nephew, Samuel Weeks, jr., and George Washington Weeks, executors of this my last will and testament, and I hereby give to them, each, or such of them as may serve, the sum of \$1,200 annually, in lieu of all other commissions or compensation allowed by law.

"33d. I authorize and empower them to hire an office and to appoint an agent, if they should deem it necessary."

Catharine Weeks, the widow of the testator, died April 7, 1882. By her death the life estate in the Fifth avenue property was terminated.

This action was commenced by a brother of the testator and by one of his executors, against the persons alleged to be severally interested, for a construction of the will and for a partition of the testator's residuary estate, as to which it is claimed he died intestate.

S. H. Thayer, for plaintiffs.

E. Ellery Anderson, for defendant Nathaniel T. Weeks.

Wm. A. Beach and Van Schaick, Gillender & Storber, for defendants Geo. W. Weeks and others.

Frederick S. Wait, for defendant Henry A. Weeks.

Graff & Blauvelt, for guardian *ad litem*.

Mathews & Rapallo, for defendants Hyatts.

Flamen B. Candler, for defendants Cornwell and others.

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Abner C. Thomas, for defendant Beckwith.

W. B. Putney for defendants Trask.

LARREMORE, *J.* — The residuary estate referred to in the twenty-fourth subdivision of the will is evidently the Fifth avenue property. All of the testator's real estate except this had been previously devised, and provision made for specific charges upon each portion thereof. We are therefore to consider :

First. His intention as to the disposition made of his residuary estate.

Second. The validity of such disposition.

It is apparent that during the life of the widow the executors had no present interest therein, but the testator designed that they should use the same in their discretion for the best interest of his whole estate, and for that purpose he gave them a permissive power to mortgage, and to divide the proceeds thus realized (after deduction for taxes, assessments, insurance and repairs), within ten years, to each and every of the legatees named in his will (except his servants), in like proportion to their previously specified legacies.

What he denominates as legacies were in reality devises, in trust and in fee, of a large portion of his real estate, which would necessarily be subject to fluctuations of value during the ten years in which distribution of the surplus realized by mortgaging the residuary estate might be made. Eighteen specific devises of a life estate and remainder in fee in several parcels of land, in different localities, constitute the basis of the intended distribution. Taken as a whole, the will plainly indicates that each portion of the property devised should bear its own burdens, and there is no foundation for the claim that this residuary estate should be used for the payment of specific liens upon the property already devised.

By the twenty-seventh, twenty-eighth and twenty-ninth subdivisions, authority is given to repair, build or rebuild upon the trust property, and to mortgage the specific parcel

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or parcels of land upon which said buildings shall be situated, for that purpose.

It was further directed, by the thirtieth and thirty-first subdivisions, that all taxes, assessments and incumbrances against his property at the time of the testator's death should be paid out of his personal estate, and if that should be insufficient, then such deficiency should be paid out of the income of his entire estate, except that derived from the property devised for life to his wife, who is directed to pay the annual taxes and all assessments thereon, with a further direction to the executors to pay the annual taxes and all assessments upon the property devised to them in trust out of the income thereof respectively.

There is no proof of the existence of any lien or incumbrance upon the premises devised.

No legacies, as such, are given by the will, nor does it confer upon the executors any power of sale or any right to receive the rents and profits of the residuary estate.

As to the twenty-fifth subdivision: The words "upon the termination of the real estate trusts herein contained" are qualified by and must be read in connection with the words immediately following, "where I have not hereinbefore disposed of the fee of my real estate."

The testator had already made disposition of the fee of all of his estate, except the Fifth avenue property, and it is a reasonable inference that by the term "real estate trusts" he meant simply the trust in relation to the Fifth avenue property referred to in the twenty-fourth subdivision. And, although he therein directs that such trust property be used for the best interest of the whole estate, this direction must be understood in a qualified sense, for the moneys to be raised by mortgage upon the residuary estate were first to be applied in payment of taxes, assessments, insurance and repairs upon it; then the remainder or surplus of such moneys was to be divided at any time within ten years among each of the legatees in the proportions named.

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Briefly stated, the testator says to his executors: I give this property to you. It may happen that the rents and profits thereof will not always be sufficient to pay future taxes, assessments, insurance and repairs thereon, or some other contingency may arise. You may raise money for that purpose by mortgaging the premises at any time within ten years, and if any surplus remains after making such payments, you will divide it among my legatees in the proportion in which their respective legacies (already bequeathed) bear to each other.

This, in substance, appears to have been the testator's intention, and if valid, should be given effect (*Keteltas* agt. *Keteltas*, 72 N. Y., 312; *Colton* agt. *Fox*, 67 *id.*, 349).

2d. Do subdivisions twenty-four and and twenty-five, above referred to, or either of them, constitute a valid trust?

The title to the residuary estate vested in the executors, subject to the life estate, and the object of the trust appears to be within the purview of the statute which confers authority "to sell, mortgage or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon" (3 R. S. [7th ed.], p. 2181, sec. 55).

Subdivision twenty-five plainly indicates an intention that the fee of the Fifth avenue property should vest in fee upon the termination of the life estate of the widow, for that trust estate was the only property which had not been previously disposed of in fee. And it is equally clear that each of the legatees named was to be regarded as a legal heir to such estate.

But the subject of the trust is indefinite and cannot be equitably enforced. In order to make division in the "proportions named" the value of ninety-seven parcels of land must not only be ascertained, but also the value of the estate of each life tenant and of the estate in remainder in fee, and also of such as may have died, or may thereafter be born. An examination of the eighteen previous devises of the will clearly show that such a distribution as is contemplated would

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be impracticable and uncertain (*Bayeaux* agt. *Bayeaux*, 8 *Paige*, 333; *Story's Eq. Juris.*, sec. 979, 1068b, 1073).

No approximation of such values can be reasonably ascertained and the *cy pres* doctrine contended for, if applicable, would be impracticable (*Jackson* agt. *Brown*, 13 *Wend.*, 445; *Story's Eq. Juris.*, sec. 1074a, p. 345).

The division of the residuary estate is predicated upon the devises previously made, and according to the proportions thereof. Unless the value of such proportions can be reasonably ascertained, the intention of the testator cannot be carried out.

To allow an equal distribution of such residuary estate among the legatees would virtually make a new will and defeat the object of the testator.

The executors by the will took the title, and not a mere power in trust. They have no authority to sell or lease, they can only mortgage, and their right to make distributions of the surplus of proceeds thus realized is to be exercised within ten years. This right does not suspend the power of alienation prohibited by the statute (3 *R. S.* [7th ed.], secs. 14, 15, p. 2176).

But executors had no power to alien the property; and their right to divide the surplus proceeds realized by mortgaging the same terminated by the falling in of the life estate, when the fee, by the twenty-fifth subdivision, vested in the legatees therein named. Yet, as before observed, the subject of the intended trust, in respect to the division of the fee of the trust property, is indefinite and uncertain, and for that reason the trust should be declared to be void.

The action for partition should be sustained, and if in its progress it shall appear that other persons than those now appearing therein are necessary parties, the court will direct them to be brought in.

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SUPREME COURT.

In the Matter of MARY McMAHON.

Criminal Law — Right of police magistrates since the Penal Code to commit for disorderly conduct — Code of Criminal Procedure, sections 887, 899, 99, 901, 64, 74, 963, 963 — Penal Code, sections 391, 724, 725, 726.

Since the enactment of the Penal Code, police magistrates have the right to commit persons for disorderly conduct, in default of bail for good behavior.

The power possessed by police justices under the former statutes to order persons convicted of disorderly conduct to find surety for their good behavior for a period not exceeding twelve months, and to stand committed for a period not exceeding twelve months, in default of giving surety, has not been affected by the Code of Criminal Procedure, or by the Penal Code.

At Chambers, January, 1883.

William F. Hone, for the petitioners.

James D. McClelland, in support of writ.

Mr. Oudin, *Justice Kilbreth* and *Mr. Vincent*, assistant district-attorney, in opposition.

LAWRENCE, J.— The prisoner was brought before me on a writ of *habeas corpus*, and her discharge asked for on the ground that it appears from the commitment, that having been convicted of disorderly conduct, she was ordered to find surety, in the sum of \$300, for her good behavior for the term of one month, and that having failed to find such surety she was committed to the city prison for the term of one month.

It is urged that, under the provisions of the Code of Criminal Procedure, the police justices are deprived of the power which it is conceded they possessed under the former statutes, to order persons convicted of disorderly conduct to find surety for their good behavior for a period not exceeding

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twelve months, and to stand committed for a period not exceeding twelve months, in default of giving such surety.

The question involved is a serious one, as a large number of the summary convictions in this city are in cases of disorderly conduct. Upon examining the Code of Criminal Procedure and the Penal Code, I have been unable to find any allusion in either Code to the offense of disorderly conduct. Counsel conceded on the argument that they had been similarly unsuccessful. Prior to the passage of the Codes there were three classes of persons who might under the law be summarily convicted before a magistrate without a jury, to wit: first, vagrants; second, disorderly persons; third, persons guilty of disorderly conduct. The distinction between these different offenses and the difference in the mode of procedure for their punishment under the Revised Statutes and the act of 1833 (*Laws of 1833, page 9, chap. 11*), the act of 1859 (*chap. 491, page 1129*), and the act of 1860 (*chap. 508, page 1013*), and other acts upon the same subject, was most clearly pointed out and explained by chief justice DALY, in his elaborate and exhaustive opinion in the case of the *Twelve Commitments* (19 *Abb. Pr.*, pages 394, 396, 397, 400), and it would be unnecessary if it were possible to add anything to what the learned justice there says in regard to those offenses.

I have said that there is no direct mention of the offense of disorderly conduct either in the Penal Code or in the Code of Criminal Procedure. But persons who come under the head of vagrants and disorderly persons are distinctly referred to in each of the Codes. Section 887 of the Code of Criminal Procedure, which consists of eight subdivisions, declares who shall be considered as vagrants. This section is contained in title 6 of part 6 of that Code, and the remaining sections of that title provide for the apprehension, conviction and punishment of vagrants.

By the 291st section of the Penal Code, certain acts or conduct on the part of children render them liable to be arrested and dealt with as vagrants, and by section 724 it is

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provided that this Code shall not affect any of the provisions of law relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this Code. So, too, those who are disorderly persons are defined by section 899 of the Code of Criminal Procedure. This section contains nine different subdivisions, but none of them refer to disorderly conduct. This section is in title 7 of part 6, and the remaining sections of the title prescribe the manner of apprehending and punishing such offenders. And as we have already seen, by section 724 of the Penal Code, the provisions of law in relation to disorderly persons, except where inconsistent with that Code, are not affected thereby. The particular ground upon which the prisoner's discharge is asked for is that by section 99 of the Code of Criminal Procedure it is provided that "security to keep the peace or be of good behavior cannot be required, except as prescribed in this chapter." Standing alone, this language is most comprehensive, and if it is to be taken literally, or if there are no other provisions in either of the Codes which must be considered in its interpretation, it would necessarily follow that, even if the offense of disorderly conduct still exists, the police justice, on a conviction for such offense, would have no authority to order the prisoner to give security for good behavior. In the case of Davis, which was before me a few weeks ago, the point was raised, but not fully argued, and, after such examination as I was then enabled to give it, I formed the impression that the objection should be sustained. As I have since learned that the question is of a very serious character, I have desired a test case to be brought, in order that I might, with the assistance of counsel, re-examine and review the matter, so that if anything had escaped me, or the counsel, on the former argument, and the result then arrived at was for that reason erroneous, the error might be corrected.

It is argued in favor of the validity of the commitment, that section ninety-nine is not to be interpreted literally, nor

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without reference to other provisions in the Code of Criminal Procedure and the Penal Code, and it is said that that section should be construed as referring only to the crimes which are subject of the part which contains the title in which that section is to be found.

The Code of Criminal Procedure is divided into six parts. The first relates to the courts having original jurisdiction in criminal actions, the second relates to the prevention of crime, the third relates to the judicial proceedings for the removal of public officers by impeachment or otherwise, the fourth relates to the proceedings in criminal actions prosecuted by indictment, the fifth relates to proceedings in the special sessions and police courts, and the sixth to special proceedings of a criminal nature. Section 99 is in that part of the Code which relates to the prevention of crime, and it is argued that when the statute says that security to keep the peace, or to be of good behavior, cannot be required except as prescribed in this chapter, it means security to keep the peace and to be of good behavior as to the crimes specified in that chapter.

The point is not free from doubt, but after much deliberation I have satisfied myself that it must be sustained for several reasons.

In the first place there is at least one section of the Code of Criminal Procedure which expressly authorizes a magistrate to require an offender to give security to be of good behavior. By section 901 if a magistrate convicts one of being a disorderly person he may require that the person charged give security by a written undertaking with one or more sureties; that,

First. If he be a person described in the first or second subdivisions of section 899, he will support his wife and children and will indemnify the county, city, village or town against their becoming within one year chargeable upon the public.

Second. In all other cases, that he will be of good behavior for the space of one year. This section is contained in the

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title of the Code of Criminal Procedure which relates to disorderly persons. The first and second subdivisions relate to persons who have abandoned their wives or children or who threaten to run away and leave them, and the remaining seven subdivisions to the numerous other persons who are declared to be disorderly. Again, by section 64 of the Code of Criminal Procedure, which is contained in part 1, relating to courts having original jurisdiction in criminal actions, it is provided that the court of special sessions in the city and county of New York has jurisdiction * * * (*subd.* 6): "To require the principal in a recognizance to appear at the court and enter into a further recognizance to keep the peace or to be of good behavior, or both, toward the people of the state for a period not exceeding one year, and on default thereof to commit him to prison till he be discharged therefrom according to law." The statute is silent as to the officers by whom or the offenses for which the recognizances therein referred to may have been taken; but it is claimed by the police justices, and I think correctly, that this section recognizes the fact that, under chapter 508 of the Laws of 1860, they had the power to take recognizances for good behavior and to keep the peace, which recognizances were required to be forthwith filed in the office of the clerk of the court of special sessions (*Laws of 1860, page 1007*).

Furthermore, by the seventy-fourth section of the Code of Criminal Procedure, "police justices have such jurisdiction, and such only, as is specially conferred upon them by statute. The courts held by police justices are called police courts, and courts of special sessions are also called police courts and are so designated in different parts of the Code." This provision is contained in chapter 4 of title 6 of part 1 of the Code of Criminal Procedure. Upon turning to the other titles and chapters of this part, it will be found that the jurisdiction of all the other courts is specifically defined. But the police justices are to have such jurisdiction, and such only (not as may be), specially conferred upon them by statute. I have not.

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been able to find any other declaration in either of the Codes as to the jurisdiction of the police justices, and it would seem, therefore, to be a reasonable conclusion that the legislature intended by the above section to preserve the jurisdiction of those magistrates as it existed before the adoption of the Codes. There is another circumstance which should not be lost sight of in determining the question which is now under consideration. It was the intention of the codifiers that both of the Codes should go into effect at the same time. The legislature determined otherwise; but in each statute a provision was inserted that, when construed in connection with other statutes, each should be deemed to have been passed on the 4th day of January, 1881 (*Code of Criminal Procedure*, sec. 963; *Penal Code*, sec. 727).

I have already pointed out that in neither of the Codes is disorderly conduct mentioned. It is well known that in this city cases of disorderly conduct constitute a large portion of the matters which come before the police magistrates. Could it have been the intention of the legislature to have allowed that class of offenders to go free, or in other words, to say that persons who would formerly have been adjudged guilty of disorderly conduct in the future should be considered guiltless? Such a result is not to be reached in construing the Codes unless it is unavoidable, and if we take the Codes together it is not unavoidable.

Section 724 of the Penal Code, as I have before observed, preserves the statutes in regard to vagrants and disorderly persons, except so far as their provisions may be inconsistent with the Code. Now by the next section (725) it is provided that "nothing in this Code affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force notwithstanding the provisions of the Code, except so far as they have been repealed or affected by subsequent laws."

* * * * *

Fourth. "All acts defining and providing for the punish-

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ment of offenses, and not defined and made punishable by this Code. Section 726 repeals all acts, and parts of acts, which are inconsistent with the provisions of this act," &c.

And by section 962 of the Code of Criminal Procedure it is provided that "this Code applies to criminal actions, and all other proceedings in criminal cases, which are herein provided for," &c.

Inasmuch as in neither of the Codes are cases of disorderly conduct provided for, the conclusion is irresistible that the acts defining that offense are not inconsistent with either Code, and that they are therefore retained.

Finally, I cannot presume that the legislature intended to abolish disorderly conduct from the statute book as an offense, and while the omission to refer in either Code to that offense is peculiar, it seems to me that the sections of the two Codes to which I referred save the prior statutes relating thereto.

The writ is therefore dismissed and the prisoner remanded.

SUPREME COURT.

MALCOMB CALHOUN and others agt. THE DELHI AND
MIDDLETOWN RAILROAD COMPANY.

Town bonds — The conclusive effect of a judgment of a county judge under chapter 907 of the Laws of 1869, as amended by chapter 925 of those of 1871 — Ratification by the payment of interest — Estoppel.

A judgment of a county judge, under chapter 907 of the Laws of 1869, as amended by chapter 925 of Laws of 1871 (providing for the issue of town bonds for railroad stock), which adjudges and determines that petitioners do represent a majority of the taxpayers of the town, as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said list or roll becomes conclusive, unless action is taken to review such proceedings within sixty days after the last publication of notice of the judge's final determination.

The whole scheme of the act is, that the bonds are to issue, provided a majority of the taxpayers and property ask for it. Whether or not such majority have so asked, the county judge is to decide, and such

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decision, when made, conclusively establishes the only fact which gives authority for their issue.

Where such judgment has been unchallenged for eleven years, it will not, in a collateral action, be adjudged void for want of a literal and exact compliance with the statute, in the form of the petition presented, when the right to render the judgment sought does not depend upon such petition alone, but upon the fact that a majority of taxpayers, representing a majority of the property of the town, desired the issue of the bonds.

The act of 1871 was passed May twelfth and took effect immediately. The petition was framed under the act of 1869, and was presented May 6, 1871. It omitted to state what the act of 1871 has been held to require, viz.: "That the petitioners constitute a majority of the taxpayers of the town appearing on the last preceding assessment-roll, not including those taxed for dogs or highway tax:"

Held, that the proceeding is not void for the failure to state this fact. The true construction is, that from the time the act of 1871 was passed it became the law as to all proceedings thereafter, whether then pending or commenced subsequently, while all that had been done before was supported by the first act, and must be judged by it. The judgment cannot be assailed upon the ground that it was not based upon a proper petition, because it was based upon a petition entirely proper and sufficient at the time it was acted upon.

The petition specified "The Delhi and Middletown Railroad Company," which it further described as "an association in said county and state," as the *company* sought to be aided.

Held, that this was sufficient. There can be no objection to the use of the word "*company*," or that it was styled "*an association*" and not a *corporation*.

It is insisted that the adjudication of the county judge was void for want of a sufficiently verified petition. That there were nineteen petitioners instead of one; that some of those differed from others, and that only one was verified.

Held, that the several papers constituted, really, only a single petition, and were handed to the county judge at the same moment. Upon one of such papers was a verification by one of the petitioners, and it was for the county judge to decide from the evidence before him whether or not such verification extended to all the names appended to the several headings, and if he decided it did, the parties aggrieved should have sought their remedy under the act. In any event, however, the one paper verified as the statute required, and averring every fact which such act makes necessary, gave to the county judge jurisdiction to act. Its averments may have been untrue, but of such truth or untruth that officer was to judge, and though he found it untrue, he

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was still authorized, if sufficient other taxpayers consented at the time of the hearing, to render the judgment authorized by the act.

Where the notice published by the county judge, upon the presentation of the petition, did not state the place where the county judge would be found upon the return day, but did designate the day, the time of the day, the month and year of the hearing:

Held, that in so doing it specified all that either the act of 1809 or 1871 required. In the absence of any designation of a place of hearing, that which the county judge ordinarily occupied for the transaction of business would be intended, and of its locality the taxpayers must be presumed to have been acquainted.

Where it was conceded that the adjudication was made and directed to be entered of record, and that it was "*entered*" in the proper clerk's office, there is nothing wanted to make the record complete.

Where it was insisted that the adjudication was void because the county judge did not, as the act of 1871 requires, publish notice of his final determination, "for three weeks at least, once in each week, in the same newspaper in which notice of such hearing was published as ordered."

Held, That the law does not make the validity of the judgment depend upon the publication, but upon the fact that it has been rendered. The want of publication does not invalidate the judgment, though it may lengthen the time for the allowance of a *certiorari* to review the proceedings.

Corporations, municipal or other, and their taxpayers or stockholders, may, as private individuals in the conduct of their affairs, so conduct themselves as to be estopped from questioning the authority of a person who has assumed to act in their behalf; and the recognition and adoption by them of acts professed to have been done for them may bind them as effectually as the conferring of the power so to do prior to their being done.

Where a large number of the taxpayers of a town, and professing to be a majority thereof, representing a majority of its property, asked the county judge of the county in which the town was situated for a judgment and action which would permit the issue of the bonds, such judge assuming to act in conformity with the requirements of the law, after notice, determined and adjudged that a majority of taxpayers and property had petitioned for the issue of such bonds, which judgment was entered of record; such judge appointing commissioners to issue the obligations of the town, which obligations were issued, and contained recitals showing their regularity, and assuming that all necessary and legal action had been taken to make them valid and binding upon the town; neither the municipality nor any taxpayer, since the rendition of such judgment and the appointment of commissioners, sought to review such judgment or to prevent the issue of the bonds, either of which could readily have been done, and for ten years, twice during

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the year, the interest has been paid upon the bonds thus issued by the proper officer of the town, its taxpayers, without objection, paying the amount levied upon them for that purpose:

Held, that the doctrine of acquiescence is applicable to this case, and because of such acquiescence, both by the town and its taxpayers, in the validity of the bonds, such acquiescence amounting to an actual adoption of them as the legal acts of the town, such town and its taxpayers are estopped from questioning their validity (LEARNED, J., dissenting).

Third Department, General Term, September, 1882.

Before LEARNED, P. J., BOCKES and WESTBROOK, JJ.

APPEAL from an order dissolving an injunction.

J. H. Maynard, for appellants.

William Gleason and *C. P. Collier*, for respondents.

WESTBROOK, J.—The plaintiffs appeal from an order of the Broome special term of the date of March 28, 1882, dissolving an injunction order granted January 2, 1882.

The action is brought by the plaintiffs, who are taxpayers of the town of Andes, Delaware county, against James Balantine, supervisor and railroad commissioner of said town, the Delhi and Middletown Railroad Company, and certain other persons, who hold bonds of said town, purporting to be issued pursuant to the provisions of chapter 907 of the Laws of 1869, as amended by chapter 925 of the Laws of 1871, in aid of the said Delhi and Middletown Railroad, to restrain the payment of such bonds, and the interest thereon, and to have them adjudged void and cancelled.

So far as the dissolution of the injunction depended upon the absence of a bond as required by section one of chapter 531 of the Laws of 1881, the order of this court reversing the order of the special term denying the plaintiff's motion to file such bond *nunc pro tunc*, must be regarded as eliminating that question from the present appeal, which will then present solely the validity of the bonds which the action seeks to annul.

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As has already been stated the bonds sought to be invalidated purport to be issued under chapter 907 of the Laws of 1869, which was amended by chapter 925 of the Laws of 1871. The questions presented upon this appeal are predicated upon both acts, and, therefore, so much of the act as amended, as bears upon such questions will be stated, calling attention when necessary to any change made thereby. The act, as amended in 1871, required, if bonds were to be issued by a town to aid in the construction of a railroad, "a majority of the taxpayers of any municipal corporation, who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment-roll or tax list of such corporation, and who are assessed or taxed, or represent a majority of the taxable property upon said last assessment-roll or tax list," to make an "application to the county judge of the county in which such municipal corporation is situate" for that purpose. Such application was to be "by petition, verified by one of the petitioners, setting forth that they are such majority of the taxpayers, and are taxed or assessed for or represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or the proceeds thereof, in the stock or bonds (as said petition may direct) of such railroad company in this state as may be named in said petition."

Upon receiving such application the county judge was directed to give notice by advertisement, "published in some newspaper in such county, or, if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that on a day therein named, which shall not be less than ten days, nor more than thirty days, from the date of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them."

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The act then declares: "It shall be the duty of the said judge, at the time and place named in said notice, to proceed and take proof as to the said allegations in said petition, and if it shall appear satisfactorily to him that the petitioners, or the said petitioners and such other taxpayers of said municipal corporations as may then and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the taxpayers of said municipal corporation, as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said tax list or roll, he shall so adjudge and determine and cause the same to be entered of record in the office of the clerk of the county in which said municipal corporation is situated, and the judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this state."

Provision is then made for a review of the proceedings before the county judge by *certiorari*, but such writ "must be allowed within sixty days after the last publication of notice of the judge's final determination;" or, if the judgment was rendered prior to the passage of the act of 1871, then such writ can only issue provided "it is allowed within sixty days after the passage of" such act. The court out of which the writ issues is required "to review all questions of law and of fact determined for or against either party by the county judge," and the section of the act from which the last quotations have been made then declares: "And the said courts or Court of Appeals, in appeals now pending and in all future proceedings, may reverse or affirm or modify, in all questions of law or fact, his final determination, or may remand the whole matter back to said county judge, to be again heard and determined by him. And it may by order direct that he proceed thereon *de novo*, in the same manner and with the same effect as if he had taken no action therein, or it may by such order specify how and in what particulars he shall hear and determine the same on such remanding thereof. Applications

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for *certiorari* shall be on notice. On review, persons taxed for dogs or highway tax only shall not be counted as taxpayers, unless that claim was made before the county judge. The county judge shall forthwith proceed to carry into effect all orders of any court on review under this act."

The act also empowers the supreme court, at general term, to compel the issue of bonds thereunder, and to "prevent by injunction the issue of said bonds, or any portion thereof, on notice and for good cause shown," and declares that "any justice of said court may grant a temporary injunction until such motion can be heard."

The provisions of the act under which the bonds issued have been so fully stated, in order that the questions involved upon the appeal may be properly understood. It is impossible, we think, to read those provisions without being impressed by the thought that they were intended and designed to prevent precisely such contests as this appeal presents. This is apparent from the fact that, while the decision of the county judge is declared to be a "judgment" and a "record," and to "have the same force and effect as other judgments and records of courts of record in this state," provision is also made for its review upon "all questions of law and of fact," for its reversal, affirmance or modification, for a new trial before the county judge, for a new hearing upon any specified particular, and for an injunction by the general term of this court to prevent the issue of the bonds, or any part thereof.

The machinery of the law is ample for the protection of every right, and the course of procedure throughout is so clearly given, and the powers of courts upon appeal are so minutely stated, that it is apparent that the legislature was aware, when it passed this statute, of the questions which, without such provisions, would continually be raised in regard to the validity of bonds issued by municipal corporations in aid of the construction of railroads, and to prevent such contests, and the injustice of having them declared void in the hands of innocent holders on account of non-compliance with

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some provisions of the law under which they were issued, they provided, as has just been stated, for a formal adjudication by the county judge prior to their issue, whose decision, subject to review by *certiorari*, was final.

Having given the provisions of the statute, under which the bonds, which are the subjects of the action, were issued, and declared in a general way, what seems to us to be the object, which the statute had in view, the proceedings thereunder will next be stated.

There is no dispute but that on May 6, 1871, a petition, purporting to be signed by taxpayers of the town, and "verified by one of the petitioners," was presented to the then county judge of Delaware county, asking that bonds of the town of Andes, to the extent and amount subsequently put in circulation, should be allowed to issue. Such petition contained every requirement, as will be hereinafter shown, made necessary by the law then in force.

Neither is it denied but that the county judge, upon receiving such petition, gave notice by advertisement in a newspaper published in the county of Delaware, and in the very town sought to be bonded, that on a day therein specified, which was, as the act required, "not less than ten days, nor more than thirty days from the date of such publication," that he would "proceed to take proof of the facts set forth in such petition, and as to the amount of taxable property represented by them."

On the day mentioned in the notice (May 22, 1871), the then county judge of Delaware county made an adjudication, which, after reciting the petition and the publication of the notice, further recited and adjudged as follows: "Whereas, due proof as to the said allegations in said petition having been made before me, and it appearing satisfactory to me that said petitioners do represent a majority of the taxpayers of said town of Andes, as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said list or roll, on motion of White and Jacobs,

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attorneys for said petitioners, I do hereby adjudge and determine that said petitioners do represent a majority of the taxpayers of said town of Andes, Delaware county, as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said list or roll, and do hereby adjudge and determine that the same be entered of record." To this adjudication and determination the said county judge appended his name and official title.

On the same day (May 22, 1871), the appointment of commissioners was made, one of whom resigned November 15, 1871, and such vacancy was immediately filled. Bonds to the extent of \$98,000, payable September 1, 1901, in sums of \$100, \$500 and \$1,000, with coupons attached providing for the payment of interest semi-annually on the first days of March and September in each year, have been issued, many of which are held and owned by the defendants. From the date of the issue of such bonds until the present action was commenced, interest thereon has been regularly and promptly paid, and at the annual session of the board of supervisors of the county of Delaware, which terminated December 10, 1881, upon the report of James Ballantine, one of the defendants, as supervisor of the town of Andes, such board caused a tax to be levied upon the town of \$6,650 for the purpose of meeting the coupons for interest due March 1 and September 1, 1882. This money has been collected from the taxpayers of the town, and paid to the supervisor for the purpose of meeting such interest. The injunction, which has been dissolved, and from the order dissolving which this appeal has been brought, restrained the defendant Ballantine from paying the interest to the holders of such bonds, and the defendants owning such bonds and coupons from transferring the same, or any part thereof.

There is no question upon the papers but that the holders of the bonds and coupons have paid full value for the same, and there is affirmative proof by some of them that they were purchased at par, and in some instances above it. The sole

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grounds upon which the injunction is sought are, that the petition presented to the county judge was insufficient to confer jurisdiction, that the notice of hearing was defective, and that, in fact, such bonding was not consented to by a majority of the taxpayers of the town of Andes representing a majority of the taxable property of such town, as shown by its last assessment-roll previous to such application.

In the discussion of the objections which have been made to the form of the application or petition presented to the county judge, and to the notice of hearing, which will be first considered, it is important to inquire how far these objections are available in this action. The general doctrine that an officer clothed with power by a special proceeding must strictly pursue his authority is unquestionable, but its applicability to this action, which seeks collaterally to review the decision and determination of the county judge of Delaware county with reference to the bonds in controversy, is more than doubtful. The legislature, it will be conceded, had the power to prevent the operation of the rule in proceedings of the character sought to be annulled. Has it taken them out of such general rule? It is true that the course of procedure is clearly prescribed, but it has also provided for an inquiry by the county judge to ascertain whether or not the parties who apply to have a town bonded "do represent a majority of the taxpayers of said municipal corporation as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said list or roll," and if he finds that they do, then "he shall so adjudge and determine, and cause the same to be entered of record in the office of the clerk of the county in which said municipal corporation is situate." Such adjudication and determination is then declared to "have the same force and effect as other judgments and records in courts of record in this state." Giving the decision of the county judge of Delaware county that effect — and in its form he has followed literally the words of the statute — is it to be pronounced a nullity in a collateral

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action merely because, in some unimportant particulars, the petition or application or the notice of hearing do not conform to the requirements of the statute?

It is apparent that the whole scheme of the act is that the bonds are to issue, provided a majority of the taxpayers and property ask for it. Whether or not such majority have so asked the county judge is to decide, and such decision, when made, conclusively establishes the only fact which gives authority for their issue. To pronounce, therefore, any issue void, in spite of the will of the taxpayers of the town, of which the recorded judgment is unanswerable proof, upon some technical objection of form, would be the substitution of shadow for substance in the administration of justice. What has just been stated to be the scheme of the act is shown, not only by its general provisions, but also by the fact that, without their names being signed to any petition, other taxpayers than those who subscribed the original petition are expressly authorized to appear before the county judge on the day of hearing, and then and there to unite in the application, and when so appearing the law makes it obligatory upon the judge, in his decision, to regard them as petitioners for the bonding. It certainly would be remarkable if a judgment of a court of record of this state should be held a nullity in a collateral action, merely because of some technical defect in the form of the summons, or because in the statement of the cause of action in the complaint there was an omission of some merely formal averment, whilst it still contained a substantial statement of the cause of action which the judgment was rendered to enforce. And so in this case, it would be equally remarkable if a judgment, unchallenged for eleven years, and declared by the act under which it was rendered to "have the same force and effect as other judgments and records in courts of record in this state;" should be adjudged void for want of a literal and exact compliance with a statute in the form of the petition presented, when the right to render the judgment sought did not depend upon such

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petition alone, but upon the fact that a majority of taxpayers, representing a majority of the property of the town, desired the issue of the bonds. It seems to us clear, then, that none of the technical objections which have been made either to the form of the petition presented to the county judge, or to the notice of hearing, are available in this collateral suit. The whole policy of the act forbids their consideration. This is apparent, as has already been stated, not only from the effect which it declares shall be given to the judgment, but also from the definite provisions made for its review, the careful enunciation of the powers of the appellate court therein, extending not only to its reversal, affirmance or modification, in whole or in part, but to the sending back of the proceeding for further hearing upon any one point, and the lodgment in the general term alone of the power to grant an injunction to restrain the issue of the bonds in conformity with such judgment. The equity of this position is obvious. Under the apparent sanction, at least, of legislative authority, and the solemn and formal judgments of judicial officers, what purport to be valid obligations of towns have been issued to the extent of millions of dollars. These obligations have passed into the hands of innocent purchasers — oftentimes, as in this case, into the hands of institutions which are the depositories of the savings of the poor — and such holders are generally incapable of detecting flaws in legal proceedings. If, therefore, any other rule than the one stated should be adopted, parties can shift from themselves to others the burdens they ought to bear, for the reason that they had either voluntarily assumed them, or had been so careless as not to prevent their creation by the use of means placed at their disposal. While insisting, then, that the act forbids the criticisms, which have been made upon the proceedings had by and before the county judge of Delaware county, we will still proceed to examine the objections made to the application and to the proceedings had prior to the rendition of the judgment.

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The act of 1871 was passed May twelfth, and took effect immediately. The petition was framed under the act of 1869, and was presented May 6, 1871. It omitted to state what the act of 1871, upon a direct proceeding to review action thereunder, has been held to require (*Town of Wellsborough* agt. *The N. Y. and C. R. R. Co.*, 76 *N. Y.*, 182), "that the petitioners constitute a majority of the taxpayers of the town appearing on the last preceding assessment-roll, 'not including those taxed for dogs or highway tax,' " and for a failure to state this fact it is claimed that the whole proceeding is void.

This objection is predicated upon the erroneous legal assumption that the act of 1871 repealed that of 1869, and rendered all proceedings taken under the latter, prior to the passage of the former, of no effect. The act of 1871 simply amended that of 1869. This is so expressly declared in its title, and while it contains new provisions, it also states how certain sections of the old act should thereafter read. In *Ely* agt. *Holton* (15 *N. Y.*, 595) it was held that, "the effect of an amendment of a statute made by enacting that statute 'is amended so as to read as follows,' and then incorporating the changes or additions with so much of the former statute as is retained, is not that the portions of the amended statute which are merely copied without change, are to be considered as having been repealed and again re-enacted, nor that the new provisions or the changed portions should be deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having continued the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the passage of the amendment." And precisely this and no more was held in *Angel* agt. *Town of Hume* (17 *Hun.*, 374) and *Syracuse Savings Bank* agt. *Town of Seneca Falls* (86 *N. Y.*, 317), the two cases cited by the counsel of the appellants. In the former judge SMITH (pages 379, 380) said: "The true construction we apprehend

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is that from the time the act of 1871 was passed it became the law as to all proceedings thereafter, whether then pending or commenced subsequently, while all that had been done before that time was supported by the first act, and must be judged by it." In the latter case, EARLE, J. (*page* 322), in speaking of this precise objection, said: "That judgment cannot be assailed upon the ground that it was not based upon a proper petition because it was based upon a petition entirely proper and sufficient at the time it was acted upon."

These authorities effectually dispose of the objection under consideration. The act of 1869, which was the one in force when the application was presented, required no statement that the petitioners were a majority of the taxpayers of the town, "not including those taxed for dogs or highway tax only." That provision was incorporated for the first time in the act of 1871. The object evidently was to prevent persons who were taxed for dogs, or a highway tax only, from being counted in determining whether a majority of the taxpayers of a town desired its bonds to issue. In other words, it defined who were the taxpayers who had the right to make the application. The judgment and decision of the judge was in the precise form that the act of 1871 required (*sec. 2*), and in reaching that conclusion it is to be assumed, nothing to the contrary appearing, that he obeyed the law which then governed his action.

It is further argued that the petition failed to state "that The Delhi and Middletown Railroad Company, in aid of which these bonds were to be issued, was a *corporation* in this state." The answer to this objection is that neither the act of 1869 or 1871 requires any such fact to be stated. The language of both acts requires the petition to state what "railroad *company* in this state" is desired to be aided. Precisely this language the petition adopts, and it specifies "The Delhi and Middletown Railroad *Company*," which it further describes as "an association formed in said county and state" as the *company* sought to be aided. In *The People* agt.

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Spencer (53 N. Y., 1), which was a *certiorari* brought to review the action of the county judge, the difficulty was that the petition failed to state where "The Rochester, Hornellsville and Pine Creek Railroad Company" was located. No objection was made upon the use of the word "company," or that it was styled "an association" and not a corporation. Whatever, therefore, was said in that case about "a domestic corporation" must be deemed to apply to the facts then presented. It seems to have been assumed that the existence of the corporation was alleged, but its location was undescribed. In this, however, that difficulty is obviated, and the only objection to it is that the petition too literally follows the language of the statute.

The appellants also insist that the adjudication by the county judge was void for want of a sufficiently verified petition. It is insisted that there were nineteen petitions instead of one, that some of those differed from others, and that only one was verified.

The petitions are identical in form except in three instances, in which, though otherwise precisely like the others, there is a condition expressed "that said road is located by Fish Lake and Shavertown." As the headings are identical, the various papers presented at the same time may be regarded as one petition. The act does not require the signatures to be appended to a single heading, and the presentation of all the papers at the same moment is one declaration or petition asking that the bonds should issue. The condition, appended in some instances, simply expresses in words the desire of the persons whose names are affixed thereto to unite in the general request, provided the road should be located as therein expressed. Such a modification of or reservation contained in the petition was not only a natural right, but is expressly authorized by section one of the act of 1871, which declares: "The petition authorized by this section may be absolute or conditional, and if the same be conditional the acceptance of a subscription founded on such petition shall bind the rail-

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road company accepting the same to the observance of the condition or conditions specified in such petition; provided, however, that non-compliance with any condition inserted in such petition shall not in any manner invalidate the bonds created and issued in pursuance of such petition." As a fact, according to the statement upon the argument, the railroad was located "by Fish Creek and Shavertown," and, therefore, no ground of complaint upon that score really exists.

It has already been stated that the several papers, which constituted really only a single petition, were handed to the county judge at the same moment. Upon one of such papers was a verification by one of the petitioners, and it was for the county judge to decide from the evidence before him whether or not such verification extended to all the names appended to the several headings, and if he decided it did, the parties aggrieved should have sought their remedy under the act. In any event, however, the one paper verified as the statute required, and averring every fact which such act makes necessary, gave to the county judge jurisdiction to act. Its averments may have been untrue, but of such truth or untruth that officer was to judge, and though he found it untrue, he was still authorized, if sufficient other taxpayers consented at the time of the hearing, to render the judgments authorized by the act.

It is also objected that the notice published by the county judge upon the presentation of the petition was defective in not specifying the place where his inquiry would be conducted.

The notice was in the exact form required by both the act of 1869 and that of 1871. It is true it did not state the place where the county judge would be found upon the return day. It did, however, designate the day, the time of day, the month and year of the hearing, and in so doing it specified all that either law required. It is also true that section two of both acts requires the judge to proceed "at the time and place named in said notice," but the assumption that the

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notice would specify a place of hearing is a very different thing from requiring such specification therein. In the absence of any designation of a place of hearing that which the county judge ordinarily occupied for the transaction of business would be intended, and with its locality the taxpayers of Delaware county must be presumed to have been acquainted. There is no pretense in any of the papers that any person was misled or deceived as to the place of hearing, and in the absence of any such averment this objection must also be overruled. It would certainly (adding in this connection an argument already presented as applicable to all these objections) be remarkable if a judgment of a court of record should, in a collateral proceeding, be held void and of no force or effect merely because the notice of trial did not specify the place in the county at which the trial would take place.

It is said that the judgment of the county judge was not conclusive because it was not entered of record. The point does not specify what was omitted to make the record complete. The statute of 1871 (and that of 1869 is similar) simply requires that officer to "adjudge and determine, and cause the same to be entered of record in the office of the clerk of the county in which said municipal corporation is situated." The county judge did make a formal adjudication in writing as required by law to justify the issue of the bonds, and did thereby "adjudge and determine that the same be entered of record." The complaint avers that such "adjudication of the then county judge of Delaware county was *entered* in the office of the clerk of said county on the 22d day of May, 1871." It being conceded that the adjudication was made and directed to be entered of record, and that it was "*entered*" in the proper clerk's office, it is difficult to see what was wanting to make the record complete.

It was also insisted upon the argument that the adjudication was void because the county judge did not, as the act of 1871 requires, publish notice of his final determination "for

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three weeks at least, once in each week, in the same newspaper in which notice of such hearing was published as ordered."

A careful reading of the papers has failed to discover the proof of such want of publication, or any averment thereof in the complaint. Assuming, however, that it was not so published the point is still untenable. The law does not make the validity of the judgment to depend upon the publication, but upon the fact that it has been rendered. The want of publication does not invalidate the judgment, though it may lengthen the time for the allowance of a *certiorari* to review the proceedings. The fourth section of the act of 1871 limits the time for allowing such writ by providing "no writ of *certiorari* shall be allowed unless said writ shall be allowed within sixty days after the last publication of notice of the judge's final determination, as provided in section two of this act, and where such judgment is so entered prior to the passage of this act, unless said writ is allowed within sixty days after the passage of this act."

The various objections which were made to the form of the proceedings had before the county judge have been considered and found untenable, and we now come to the last and, perhaps, principal point of the appellants, that "the bonds are void because a majority of the taxpayers of the town did not sign the petition; nor did the person signing own or represent a majority of the taxable property of the town."

This point is not made against bonds, as already stated, which have been issued and purport to bind towns when taxpayers have had no opportunity to be heard, but against some which have been issued under a law which provided for a hearing before a judicial tribunal on notice, an adjudication by such tribunal, and an opportunity for review. The proceedings have been examined and found to be regular, and the question presented is, can the decision of that tribunal, upon a question of fact, be held in this collateral action, erroneous? Whether or not a majority of the taxpayers, repre-

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senting a majority of the taxable property of the town of Andes, asked for the issue of the bonds, the county judge of the county of Delaware, within which the town was located, was authorized to decide, and his judgment, as has already been several times stated, is declared by statute, when made, "to have the same force and effect as other judgments and records in courts of records in this state." Words are useless if his decision can in this action be held erroneous and void, and no reported case to which we have been referred maintains any such proposition. On the contrary, the distinction between bonds issued under the acts of 1869 and 1871, and their issue by towns under acts which make the affidavit or certificate of some officer evidence of the requisite consents having been obtained, is manifest and has been repeatedly recognized. The judgment of the county judge has been held conclusive upon the question of consent by the taxpayers under the acts referred to, whilst the right to question the truth of an affidavit only is maintained. In *Town of Springport agt. Teutonia Savings Bank* (84 N. Y., 403), which is one of the cases cited by the appellants, in speaking of the effect to be given to an affidavit of a town officer, judge RAPALLO (page 410) said: "The case of *People ex rel. Yawger agt. Allen et al., Assessors* (52 N. Y., 538, 542), draws the distinction between the effect of this *affidavit* and of the *judgment* of a county judge under other bonding acts." In the case referred to by judge RAPALLO, judge GROVER (pages 541, 542), after pointing out the difference between the statutes which require a judgment by the county judge and those which require an affidavit by some officer, says: "In the former the county judge, if he finds the petition sufficient in number and amount of property, is to give judgment accordingly, which is made *conclusive* proof of such facts. In this the assessors, or a majority are to make an affidavit, which is made *proof* of the facts." Nor was this new doctrine. In the *People agt. Smith* (45 N. Y., 772) the court of appeals had held the decision of the county judge final. On

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page 777, in announcing the opinion of the court, judge GROVER said: "It must be borne in mind that the determination is final, not only as to taxable inhabitants who appear and contest the fact, but equally so as to those who do not appear."

It is scarcely necessary to add a word upon this point. The counsel for the plaintiffs incorrectly stated the provisions of the bonding act when he argued that the jurisdiction of the county judge to make the order depended upon the fact that the consent of a majority of the taxpayers of the town had been obtained to the issue of the bonds. It would be more accurate to say, that while such act contemplates a consent to the issue by a majority of the taxpayers of the town representing a majority of its property, it also provides a mode for the ascertainment and establishment of that fact; and that when the giving of such consent has been adjudged and declared, as therein pointed out, such judgment, unless reversed, conclusively and forever establishes that fact. It is true that the petition must allege that the requisite consent has been given, but its possible untruth in this particular is recognized when the officer is directed to count not only the names signed to such petition, but also such as appear upon the return day and then desire to unite in the application. Provision is then made for an adjudication by the officer to whom such petition must be presented upon the very question now sought to be raised, and that adjudication, unless reversed, is, as has just been stated, conclusive. The decision when made may be wrong, and in a general sense the county judge had no power to make a wrong decision, but error is inseparable from human tribunals, and, if committed, it cannot be made legally to appear to the court in a collateral action any more than the wrong of any other judgment of a court of record can thus be shown, because the statute has prohibited it.

Having examined the various objections made upon the argument to the validity of the bonds sought to be invalidated, and found them untenable, this opinion might terminate with the direction to enter an order affirming that of the special

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term, from which the appeal is taken. The importance, however, of this case, and the obvious fact that there are many other suits already brought, and that many more may be brought, involving the validity of bonds issued by towns in aid of railroads, induce us to comment upon another point which the papers upon this appeal sharply present, and that is the effect of the conduct of the town and its taxpayers with reference to the bonds now sought to be invalidated.

In the examination of this question it is not our purpose to discuss any point of difference existing between the federal and state courts as to the force to be given to recitals in bonds of this character. It may be proper, however, to say that our own views coincide with the court of appeals, expressed in *Cagwin agt. Town of Hancock* (84 N. Y., 532, 542) and several other cases, that as a rule such instruments do not become the obligations of the municipality unless the prerequisites required by the law authorizing their issue have been complied with. While maintaining this doctrine, however, we further insist that when a municipal corporation is authorized, through the action of its taxpayers, to have appointed for it agents or commissioners to issue bonds or evidences of indebtedness in its behalf, and when such agents or commissioners, who have apparently been so appointed in pursuance of the authority of law, do issue in its behalf what purport to be the obligations of the municipality, which, after their issue, such municipality and its taxpayers, by both negative and affirmative action, treat as valid and binding obligations during a series of years, that then neither the municipality nor its taxpayers can urge any objection to their validity founded upon alleged irregularity in the appointment of such agents or commissioners, or in the issue of the obligations. We do not, of course, intend to affirm that an act of a municipal corporation expressly forbidden, or *ultra vires*, can be upheld upon the ground of acquiescence, but that which it may legally and lawfully do, when a majority of its taxpayers, representing a majority of its property, consent, and which purports to have been thus

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done, will be upheld when long acquiesced in; and it will especially be so held in favor of parties who have in good faith parted with their money and property on the assurance of its validity given to them by such past actions of such municipality and its taxpayers.

This doctrine is abundantly sustainable both upon principle and authority. In reaching such a conclusion by reason alone, without the aid of adjudged cases, we have to apply only familiar principles. The legal rule, that when one individual has assumed to act for another as his agent, and the party purporting to be bound adopts the act as his own, that such adoption is as effectual to validate the act as an original authority, is well settled. So too where the act of the agent purports to bind a number of persons, either by making an obligation professedly for them in their individual names, or executing it in some name which represents them as individuals, each person who adopts and ratifies the act as his is bound by it. No good reason can be given why this general and well settled rule of law should not apply to the taxpayers within a municipal corporation. It is true that when the obligation of a municipality issues it does not in words profess to be one which individuals are to discharge, but it is in fact one of that character. When made and delivered as the evidence of a debt, which the corporate body is authorized to contract and to issue therefor its written promise to pay, such promise of payment is really the promise of individuals, because out of their property its payment must be enforced. The name of the corporation in which the obligation issues really represents them, and, if unauthorized, solely because they have not consented to such issue, they and each of them must be careful not to adopt it as theirs, for such adoption, as adoption of what purport to be individual obligations, makes it their act as effectually as an original authority would do. Of course, in enunciating this principle, we intend to apply it only to such acts as may be lawfully done by the municipality to bind the property within its limits. That which the law forbids it to do it cannot do, but that which it

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may do by and with the consent of the taxpayers will be assumed to have been so done when such taxpayers, during a series of years, have by their action most emphatically declared that such consent was in fact given. If the relief sought by this action is granted, though in form the bonds of a town are declared void, yet individuals only are relieved from the payment of obligations which they had power to authorize and in regard to which they have so acted as to forbid the denial by them that such authority had been conferred. If the validity of the bonds in question had only been acquiesced in by the officers of the town, as the ratification in such a case would be the adoption by agents of acts by others also professing to be the agents of the town, the estoppel upon the taxpayers would not be so apparent, though even in such a case, under certain circumstances, it might apply. In this case, however, not only have the officers of the corporation again and again admitted by their official action the validity of the bonds, but each taxpayer of the municipality has year by year, for ten successive years, when called upon to contribute his or her share of the annual interest, had the question of the adoption or the repudiation of the bonds sharply presented. It is idle to argue that the payments were involuntary. This is not true. Any of the taxpayers had the right to prevent the imposition of the tax or its collection when imposed. Nothing of the kind, however, was for ten years attempted, and during all that period, with perfect and complete knowledge of every fact, parties have assumed to act as their agents, not only in the issue of obligations purporting to bind their property, but also in the collection from them and each of them of the yearly interest due upon the securities issued. Not a single taxpayer during these past years has, so far as this case discloses, ever expressed any dissent from the action of agents who claimed to exercise powers legally conferred, but on the contrary, each one has, for himself and herself, by paying his and her share of the interest annually, deliberately and formally admitted the authority to

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bind the property taxed. Under such circumstances, we see no more reason to permit the present plaintiffs, who have thus acted, to question the validity of these obligations, than they would be permitted to question obligations professing to bind them as individuals which they had for ten years recognized as theirs by making annual payments thereon. In principle, the cases are identical, and the distinction is in name and not in substance. In both, when obligations are issued, the individual property is reached by a judgment thereon, and if it is competent for the individual to assent to an act as his when the act professes to be for him as an individual, it is equally competent for him, as a member of a municipal corporation, to assent to the act as that of the corporation, and as such, creating a valid obligation in his behalf, and when all those who bear the burdens of the municipality have thus consented, each one and all are thereafter estopped from questioning the act as obligatory upon him or her. This reasoning clearly commends itself to equity and good conscience, for the effect of what the taxpayers and officers of the town have done is obvious. They have thereby established the credit of obligations they now seek to annul. Such obligations, on the faith of their action, were bought as investments not only by private parties for themselves, but also by institutions and persons as investments for trust funds, and now, when held outside the town, the individuals who have deceived others in becoming purchasers seek at this late day to compel such buyers to lose the money they have in good faith paid. The defense does not commend itself to any just sense of right and fair dealing, and is no defense in fact in law, as has been frequently declared, both in elementary treatises and in adjudged cases, as we shall next proceed to establish.

Judge DILLON, in his valuable work upon Municipal Corporations (*vol. 1, sec. 548, 3d ed.*), says: "As experience shows that the officers of public and municipal corporations do not guard the interest confided to them with the same vigilance and fidelity that characterize the officers of private corporations, the

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principle of ratification by laches or delay should be more cautiously applied to the former than to the latter. *But the principle applies to both classes of corporations as well as to natural persons.* The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution, or of an act of the legislature, or which are obviously *ultra vires*. * * * As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or taxpayer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, *or paying interest on them for a series of years*, has been held to estop the municipality from defending, on the ground of non-compliance with the conditions precedent, especially when the bonds, as is usually the case, have been negotiated for value." This doctrine, so clearly stated, is well established by adjudged cases.

When, under a law of Connecticut, bonds had been issued by the city of New London to a railroad company, which could only issue by the approval of two-thirds of the electors present at a city meeting held for that purpose, and such bonds had been publicly sold, their validity recognized in various ways, and among others by the payment of semi-annual interest thereon during a period of seven years, and "no citizen had taken any means to prevent the sale of the bonds or the payment of the interest," it was held by the supreme court of errors of the state of Connecticut in *Society for Savings agt. The City of New London* (29 Conn., 174), "that the city in those circumstances was equitably estopped from denying the validity of the bonds against parties who held them in good faith, and that individual citizens and taxpayers, having thus acquiesced in the conduct of the city, were equally estopped from denying their validity, so far as these individuals were concerned."

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The case just referred to was a very important one; it was most fully and elaborately argued, and the unanimous opinion of the court, prepared by ELSWORTH, J., is worthy of a careful study. The comments of the learned judge on pages 192, 193 and 194, upon the attempted repudiation by the city of New London of the obligations, after being acquiesced in by it and its citizens, are especially applicable to the case before us.

The doctrine of the Connecticut case — that municipal corporations, which have power to appoint agents to issue for them obligations, may, like individuals, adopt and make valid an act, which was in the beginning insufficiently authorized — is also maintained in *Stuart agt. School District No. 1 of Kalamazoo* (30 Mich., 69; opinion by COOLIDGE, J.), in *State agt. Van Horns* (7 Ohio St. R., 327), in *Tash agt. Adams* (10 Cush., 252), in *Zabriskie agt. C. C. and C. R. R. Co.* (23 How. [U. S.], 281, 400), in *Supervisors agt. Schenck* (5 Wall., 772; see pages 781, 782 and 783), in *Pendleton County agt. Amy* (13 Wall., 297, 298) and in *County of Clay agt. Society of Savings* (104 U. S. R., 579).

The same rule of law, or the principles on which it depends, has also been repeatedly held in this state.

Thus in *Hoyt agt. Thompson's Executors* (19 N. Y., 206) it was decided that "a corporation may ratify the unauthorized acts of its agents, which are within the corporate powers, and such ratification may, it seems, be held from acquiescence merely."

In *Peterson agt. Mayor of New York* (17 N. Y., 449) it was held, "A resolution adopting the plans, working drawings, &c., prepared by an architect, at the request of a committee not empowered for that purpose, and directing the erection of a market according to such plans, &c., the resolution being passed with notice of the facts, is a ratification as effectual to bind the city as an original employment by an express resolution."

• In *New York and New Haven Railroad Company agt.*

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Schuyler and others (34 N. Y., 30, 49) it was held that "a corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or *negligent* tort or wrong which it commits, however foreign to its nature or *beyond its granted powers* the wrongful transaction or act may be." And it was further held in the same case (page 63) that "it is a well recognized branch of the law of principal and agent that without any express or implied appointment an *implied agency* may arise from the conduct of a party."

In the case last referred to The New York and New Haven Railroad Company was held liable for the losses which innocent buyers had sustained by the purchase of certificates of stock, in excess of its capital, issued by one Schuyler, not because he was actually empowered to issue them but because the company, by its action and conduct, was estopped from denying an agency or authority in him to do for and in its behalf the acts by which others had been injured.

The foregoing authorities abundantly establish the proposition that corporations, municipal or other, and their taxpayers or stockholders may, as private individuals in the conduct of their affairs, so conduct themselves as to be estopped from questioning the authority of a person who has assumed to act in their behalf; and that the recognition and adoption by them of acts professed to have been done for them may bind them as effectually as the conferring of the power so to do prior to their being done. A recital of the facts of this case will show the applicability of this principle to its decision, and they are again stated in this connection.

It is conceded that a large number of the taxpayers of the town, and professing to be a majority thereof, representing a majority of its property, asked the county judge of the county in which the town was situated for a judgment and action which would permit the issue of the bonds now sought to

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be annulled ; that such judge, assuming to act in conformity with the requirements of the law, after notice, determined and adjudged that a majority of taxpayers and property had petitioned for the issue of such bonds, which judgment was entered of record ; that then such judge appointed commissioners to issue the obligations of the town, which obligations were issued, and contain recitals showing their regularity, and assuming that all necessary and legal action had been taken to make them valid and binding upon the town ; neither the municipality nor any taxpayers since the rendition of such judgment and the appointment of commissioners on May 22, 1871, sought to review such judgment or to prevent the issue of the bonds, either of which could readily have been done ; for ten years, twice during the year, the interest has been paid upon the bonds thus issued by the proper officers of the town, its taxpayers without objection paying the amount levied upon them for that purpose, and now, after the money necessary to pay the interest for the year 1882 has been collected from the taxpayers and is in the treasury of the town for that purpose, this action, the first one instituted, is brought to restrain such payment and to declare the entire issue illegal and void. In other words, both the municipal corporation and its taxpayers have, by both negative and affirmative action, ratified the action of the commissioners, declared over and again that the bonds were precisely what they purport to be, the valid obligations of the town issued under the authority of law and in accordance therewith, and now, when others have in good faith become the owners thereof, and the town and its inhabitants have had and now have whatever of benefit or advantage the expenditure of the money realized from their sale has created, an attempt is made by the action of courts, which should do justice and equity, to throw upon others the burdens which they voluntarily assumed, and which they had repeatedly stated, by acts of the most unequivocal character, they would cheerfully sustain.

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It is not denied that the bonding of towns in aid of railroads has imposed great burdens, and in many cases great injustice was originally perpetrated. Whatever action was taken in the bonding of the town of Andes was nevertheless voluntary. If the taxpayers were originally imposed upon, the law provided a remedy. They were not compelled either to submit to the issue of the obligations nor to the payment of interest thereon. The courts were open for redress. In this, as in many other instances, they were willing to have the world regard the obligations in controversy as instruments issued by their authority until all were marketed to strangers to the entire transaction. Their conduct has deceived the parties whose money has purchased the evidences of indebtedness before their maturity. Such buyers could only see apparently valid obligations, an apparently valid judgment, and recognition, year after year, of what the bonds and judgment declared. A stronger case for the application of the doctrine of acquiescence cannot well be presented, and because of such acquiescence both by the town of Andes and its taxpayers in the validity of the bonds, such acquiescence amounting to an actual adoption of them as the legal acts of the town, such town and its taxpayers must be held to be estopped from questioning their validity.

For the reasons which have been given the order appealed from must be affirmed, with costs.

Mem. by LEARNED, J. — I concur in the result. But I am not willing to say that the payment of interest is an estoppel; at least as to any persons, except those who may have purchased bonds, relying on the fact of previous payments of interest by the obligors.

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SUPREME COURT.

FRELING H. SMITH, as receiver, &c., agt. SIMON DANZIG *et al.*

Corporations — Directors when and under what circumstances may resign — When and how such resignation becomes effective — Rule eighty-one — Receiver of a corporation may be appointed in a judicial district, other than the one where its office and business is located — Motion for removal of receivers &c., should be made in district where he was appointed.

The directors of a corporation, when they find that the corporation is insolvent; that its affairs are growing worse every day; that the danger is imminent; that the remaining property will be wasted, leaving the bulk of its creditors unpaid, may lawfully resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors, and such resignation becomes effective to vacate the respective offices without any affirmative act of the corporations.

A receiver may be appointed in an action brought in the second judicial district by a stockholder residing there, of a corporation having its office and place of business in the first judicial district.

And this is so, notwithstanding the provision of rule eighty-one of the general rules of practice that "such appointment must be made in the judicial district in which the principal place of business of such corporations is situated."

The supreme court is an entire tribunal, and whenever a suitor in pursuance of a statutory right invokes its powers, it is bound to perform its duties, and if the appointment of a receiver happens to be a part of its duty, it is not the office of a mere rule to abridge its powers or work a denial of justice in the premises.

A rule of court, in order to be valid, must be consistent with the Code, and rule eighty-one is not in harmony with the statutory right of a party to locate the venue of his action in the county where he resides. If any complaint is to be made against a receiver it should be made in the action and district in which he was appointed.

Special Term, January, 1883.

THIS is a motion to make the injunction permanent against Danzig's action in New York, and for instructions to the receiver.

John L. Hill and L. W. Emmerson, for plaintiff.

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Hon. B. F. Tracy, Hon. John J. Adams, E. W. Bloomington, Alex. Blumenstiel, S. F. Kneeland, Fred. G. Anderson, M. H. Ellis, for judgment creditors, opposed.

Isaac L. Miller, for Jaffrey & Co.

Charles E. Lydecker, for Eddy, judgment creditor.

W. I. Washburne, for a judgment creditor, claiming a preference.

Rastus Ransom and *Mr. Clinch*, for stockholders.

S. F. Prentiss, for the corporation, also appeared and asked to have the injunction and receivership continued.

PRATT, J.—In order to arrive at a clear understanding of the matters involved in this motion, it is necessary to make a somewhat extended statement of the facts.

On the 26th of December, 1882, the plaintiff was appointed receiver of the Co-operative Dress Association, a domestic corporation of the limited liability class, under an act of 1875, located in the city of New York, in an action brought by one Coles, a stockholder, on the ground that no officer remained empowered to hold or preserve its property. The plaintiff qualified and took possession of the property of the company, which consists of a large stock of dry goods, dresses, suits, &c., a very large proportion of which depends upon style and season for the realization of any fair approximation of their cost or value. The corporation is insolvent, and its property must in some way be taken by its creditors. Hence, it is obvious that the goods cannot be sold at retail, as the company intended when it purchased them, and they must therefore be sold to the best advantage consistent with the preservation of the rights of all concerned. On the twenty-third of December one Schuloff obtained an attachment, in each of two actions, in this court, to secure an aggregate sum of about \$5,000, and caused the same to be levied on the silks and

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velvets in said stock, which cost and were inventoried at some \$21,000. A motion is now pending in the first district to vacate that attachment, the corporation denying any liability to Schuloff, except for immature indebtedness.

On the twenty-seventh of December the defendants, Nicholas, Myers, Danzig, Eddy and others, recovered judgments against the company for various sums, which were duly docketed in New York county, and upon which executions were duly issued to the sheriff. Eddy's execution was returned on the twenty-eighth day of December, and he thereupon instituted a suit for the sequestration of the said property, pursuant to the statute. On the thirtieth of December the plaintiff was appointed receiver in that action and duly qualified. On that date the Danzigs, upon leave granted by this court in the first district, commenced an action as judgment creditors, in that district, in behalf of themselves and others in like situation, alleging that the plaintiff's appointment in the Cole action was collusive, irregular and void, constituted an obstruction to their execution, and asked for the appointment of a receiver of the property. They also obtained a temporary injunction restraining the plaintiff from any interference with the said property, except to preserve the same.

It is evident that this injunction was obtained under at least this misapprehension, viz., that the plaintiff intended to make some disposition of the property beyond its mere preservation. It now appears, too plainly to admit of controversy, that no such thing had ever been attempted, and had not even been considered, except as a matter to be recommended to the court for its action. The said action in the first district, if meritorious at all, must therefore be justified on some other ground. On the third day of January the plaintiff presented the fact of the Danzig suit to this court in the Cole and Eddy actions, and was instructed to bring an action to enjoin the prosecution in the Danzig suit, and in pursuance of such instructions he has commenced an action, and the court has restrained Danzig and the other judgment creditors who may

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join therein, and the present application is to continue that injunction.

On the third of January, on the application in the respective suits of Cole and Eddy, a general injunction was granted against suits for the recovery of money and other actions. On the sixth of January the plaintiff applied to this court in the three actions named, the Cole, Eddy and receiver's action against the judgment creditors, for instructions, and upon notice to the Danzigs in these actions, asked for leave to sell the merchandise, &c., on the ground that the property is liable to rapid deterioration, and that its preservation involves great expense. It is apparent that the danger from this cause is very great, and that such sale should be made unless imperative legal difficulties intervene. All the parties who were heard in court concur in this necessity.

It is claimed that the entire question turns upon the validity and propriety of the plaintiff's appointment as receiver. It is conceded that if the plaintiff is receiver in fact and in law, all the other supposed objections will be found resolvable under the practice applicable to such cases.

First, then, of the exigencies under which the officers resigned and the resulting necessity for the receivership.

Referring to the complaint in the Cole's action, we find a distinct allegation of insolvency, in that the directors had determined that the property should immediately be placed in the hands of a receiver.

It is plain that prior to the directors attempting to resign the company had become insolvent. Numerous suits were pending against the company, aggregating nearly \$40,000, to which there was no meritorious defense.

The company was under very heavy expenses for employes, and was doing a losing business, and this exigency was presented to the board of directors; that judgments would be recovered and the property would be sold out under executions satisfying but a small portion of the liabilities of the company, and leaving all the other creditors without any

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remedy except possibly a suit against the stockholders for the satisfaction of their claims.

It is therefore plain that the determination of the directors was in the interest of all the creditors without distinction. Indeed it was their clear duty to accomplish an equal distribution of all the property of the corporation if it could be legally and properly done

This was the policy of the law. Unlike the case of individuals, insolvent corporations are forbidden by law to grant preferences to any creditors. They are forbidden from making assignments, partly for that reason and in part because that involved the selection of their own trustee, and so working out indirectly that which they are forbidden to do directly (15 *Barb.*, 62; 33 *N. Y.*, 95).

But, strangely enough, while this general policy is perfectly clear, the provisions of the new Code are somewhat obscure as to the means by which this general object is to be accomplished. For example, so long as corporate property remains in the hands of its officers it is liable to levies under attachment or execution. Thus creditors whose debts happen to be due may take all the property. Fortunate or favored parties, through the useless sacrifices and delays which usually and necessarily attend a sheriff's sale, may wholly defeat the general creditors and subject them to needless loss. Even in cases where the application is made by the directors for voluntary dissolution under section 2419, any creditor who recovers a judgment without the assent of the corporation (*sec.* 2430) will take the property because this court has held that in such a proceeding a temporary receiver cannot be appointed (*Ex parte French Manfg. Co.*, 12 *Hun* 488; *see case of Open Board of Brokers, per* LAWRENCE, J., *N. Y.*, *spl. term, April*); and that the only receivership authorized by law was by final judgment, which "must be not less than three months after the commencement of the proceeding" (*Sec.* 2423 *and sec.* 2429). It is needless to add, that under the peculiar circumstances of this case, as disclosed by the papers in the

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Cole's suit, there being nearly \$40,000 of suits pending against the corporation, any such effort to obtain a receivership would have been useless. The corporation would have been stripped so that the receivership would have been a meaningless formality.

To have remained in office if they could have legally resigned in the face of such consequences, as were impending on the day the directors resigned, would have been a responsibility which they might justly seek to avoid.

It being clearly established that the motive and purpose of the resignations in question were proper, it seems to me that under the authorities the directors could lawfully resign, and that such resignation became effective to vacate the respective offices without any affirmative act of the corporation (12 *Hun*, 613, *aff'd*, 63 *N. Y.*, 624; 14 *Hun*, 492; 81 *N. Y.*, 46 and 49).

The Eddy action stands upon quite a different basis. The latter is an action clearly within the provisions of the statute, and under which the fund may certainly be distributed among the creditors of the corporation, unless the appointment of the plaintiff in this suit is invalid by reason of rule eighty-one.

This rule in my view presents no difficulty or even embarrassment.

This action belongs to the class specified in section 984 of the Code, which, subject to the power of the court to change the venue, "must be tried in the county in which one of the parties resided at the time of the commencement thereof."

The plaintiffs, Cole and Eddy, resided in Brooklyn at the commencement of each of these actions, and therefore had a *statutory right* to bring the actions in Kings county.

It was a proper venue, and the court cannot, under the statute, compel any change of venue for any cause that now appears.

In such an action, thus properly located in Kings county, a motion for a receiver or any other relief could not have been made in the first judicial district (*Sec. 769, new Code*).

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A rule of court, in order to be valid, must be consistent with the Code, and it seems to be clear that rule eighty-one is not in harmony with the statutory right of a party to locate the venue of his action in the county where he resides. A bare statement of the proposition is sufficient to show the invalidity of the rule (55 *N. Y.*, 524; 14 *Abb. Pr.* [*N. S.*], 124; 64 *N. Y.*, 120).

It should not be forgotten that this matter relates to mere venue. That the supreme court is an entire tribunal, and that whenever a suitor, in pursuance of a statutory right, invokes its powers, it is bound to perform its duty, and if the appointment of a receiver happens to be a part of its duty, it is not the office of a mere rule to abridge its powers or work a denial of justice in the premises.

If these views are correct, it follows that the plaintiff's appointment was regular and valid, and that he took such rights as the statute conferred upon him under such appointment. It seemed to me that the plaintiff took title to the property, and that the corporation ceased to own it.

He was appointed to protect and preserve the property at the suit of a stockholder (*subd.* 3, *sec.* 1810 of *Code*), and he holds the title until a court of equity in that action shall determine the question touching the fund, and make a final order in the premises (*Mickles agt. Rochester City Bank*, 11 *Paige R.*, 118).

It is not necessary to discuss the question raised by the plaintiff's counsel, whether the allegations in the suit of *Danzig agt. Smith* are sufficient to give a standing in a court of equity, the *Cole* action having been first commenced. A just and proper administration of affairs will not favor actions instituted in other districts wherever it may suit the caprice or interest of a disappointed creditor to test the validity of the appointment of the present receiver.

If any complaint is to be made it should be in the action and district in which he was appointed (*Rinn agt. Astor Fire Insurance Company*, 59 *N. Y.*, 143; *In re Atty.-Genl. agt.*

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Guardian Ins. Co., 77 N. Y., 72; and opinion of general term, fourth Sept., in same case; see, also, *Atty.-Genl. agt. North America Life Ins. Co.*, per WESTBROOK, J., *Ulster special term*, 1879).

But assuming that the contention of the defendant Danzig and the other judgment creditors is sound, and that he having issued an execution prior to plaintiff's appointment in the Eddy suit, he thereby has an absolute lien and is entitled to a preference over all other creditors, and assume, further, that all the judgments obtained prior to the plaintiff's appointment in the Eddy suit, together with the attachments of Schuloff, constitute liens upon the property, does that furnish any argument why the temporary injunction issued herein should be dissolved?

The case would then be that a few creditors representing a small proportion of the indebtedness of the corporation claiming the right to sacrifice all this property to the detriment of the interests of the other creditors and stockholders. A court of equity should protect the interests of the general creditors and stockholders, if it can be done without injury to the judgment creditors (assuming that they have such lien) by an immediate sale of the property and a stoppage of the running expenses, thus obtaining a large fund for general distribution.

It is for the interest of all creditors that the property should bring as much as possible, and the proof is abundant and conclusive that the quicker a sale can be made the more the property will bring.

It is therefore proper that the property should be immediately sold, the fund which it shall bring upon such sale should be substituted for the property itself, and if Danzig, Schuloff and others should have any valid lien thereon, it can be established and settled in the present action. It follows from these views that the injunction should be continued until final judgment in this action.

The next question to be considered is that relating to the

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plaintiff's application for instructions upon notice to the Danzigs in this action and in the Eddy & Cole's actions as well.

The power of the court to make a sale of the property is undoubted. Independent of any statute a court of equity has inherent power to direct such a disposition of the fund as it shall deem wisest and best for the interests of all concerned. But under the statute the power is clear (*secs. 1788, 1789 of the Code*); for although it may be fairly argued that the statute does not in terms apply to the Cole's case, it certainly applies to the Eddy case, which is strictly within article 3 of title 2 of chapter 15.

It will be noted that the exercise of the power of sale in the Eddy action does no harm to any judgment creditor whose execution was issued before the plaintiff's appointment in the Eddy suit, because, by reason of the plaintiff's title in the Cole suit, a fund was brought into court in Cole's suit and sold. No lien or title was acquired by or through the sheriff under execution. But, even if Danzig has a lien, it can be proved, as I have before indicated.

The order of sale should be entitled and entered in all the actions, and the receiver should have power to sell upon such terms as he shall deem best.

It seems that he is aided by a committee of experienced merchants, each of whom is interested to secure the very best price for the property, and any limit upon his power of sale, whether it be exercised through or in consequence of bids under his advertisements, or at auction through some reputable auctioneer or commission house, can only embarrass and tend to defeat the end in view.

If, however, the receiver should refuse to comply with the just demands of the creditors having any considerable claim against the said corporation, in regard to the form or terms of sale, a special application may be made to the court upon one day's notice to the receiver. The proceeds of the sale should be immediately deposited in some trust company,

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which will pay the best interest on the deposit, to the credit of the receiver to be drawn upon the order of the court in the Cole and Eddy actions. The sale should be absolutely without prejudice to the right of any creditor, and the order should provide that each creditor should have the same rights in the fund which he now has in the property.

The matter of Schuloff's attachments can scarcely present any serious difficulty. The Eddy and Cole suits are brought for the benefit of all concerned; and Schuloff, even although not strictly a party on the record, is nevertheless and in fact a party, because he is a creditor (*Attorney-General agt. Guardian Ins. Co.*, 77 *N. Y.*, 272, 277), so that he is enjoined by the general injunction which has been entered under section 1806, and it appears that he has appeared in these actions and made a motion to modify that injunction. It is scarcely conceivable that any real difficulty can arise between the receiver and parties who simply desire the protection of Schuloff's rights under the attachment; but as against that contingency the order may provide that the receiver may, if necessary, procure sufficient advances on the goods which have not been attached to meet any exigency of the case, and, out of those amounts he may make special deposits or otherwise exercise the rights and privileges of the corporation, as defendant in the attachment suit, to procure the discharge of the attachment, and so realize and procure the sale of those goods.

The receiver should also commence proceedings to vacate and discharge the attachment, and for that purpose and to that extent the general injunction against suits, &c., may be modified so that either party to that suit may present their proofs touching the attachments; but in all other respects the injunctions should remain.

The order should also provide that the receiver, upon a copy of the papers in this action, and a copy of the order to be entered herein, shall make special application to this court in the Danzig action, in the first district, for the purpose of

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permitting a sale and disposition of the property herein directed to be sold, so that the proceedings in these actions may be harmonious, and the rights of all parties be protected and preserved.

Now, in considering the questions involved herein, I have given the subject all the care that my limited time and other pressing duties would permit, and I am deeply impressed with the idea that if it shall be determined that the directors of a corporation, when they find that the corporation is insolvent; that its affairs are growing worse every day; that the danger is imminent; that the remaining property will be wasted, leaving the bulk of its creditors unpaid — if they cannot under these circumstances resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors, then the subject imperatively calls for legislative action. But, even should it be held, as I think it must be, that they can resign under such circumstances, yet one or more stubborn or dishonest directors might defeat this action.

The decision of these motions, however, does not depend upon the power of the trustees to resign, as the receiver is in possession of the property under his appointment in the Eddy action as well as in the suit of Cole, and the whole controversy turns upon the question as to the right of the judgment, attaching and general creditors, and these questions can and should be all determined in the action now pending in this district.

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N. Y. COMMON PLEAS.

In re the Assignment of JOHN A. SWEZEY and JOSEPH DART to JOHN A. BAGLEY for the benefit of creditors—And the papers on appeal to the general term from two special term orders.

Assignment act—Papers on appeal—Separation of papers on two appeals in same proceeding—Opinion of court below to be inserted in appeals from orders in non-enumerated motions—Papers not used to be expunged—Code of Civil Procedure, sections 135¹, 1356 and 1361—Supreme Court Rules 40 and 41.

Where, in a proceeding under the assignment act to compel the attendance of one of the assignors before a referee for examination respecting a trade-mark, as a witness, on the application of creditors, two appeals are taken by the assignor, namely, one from an order denying a motion to set aside the original order directing such examination, and the other from an order denying a motion for a stay of proceedings and leave to apply to another judge for such stay, the papers on the two appeals are bound up and served together:

Held, the papers on appeal are obnoxious to the objection of respondent's motion that they be separated. The papers submitted on each order should be separated.

Where, in such case, an opinion was filed by the court below, giving reasons for the decision of the motion, the opinion should be inserted as a part of the papers set up for review to the general term.

Where papers are inserted which were never used nor submitted at special term, a motion to suppress them will be granted by the judge who heard the motion on settlement. Adjournments indorsed on the papers used by the court below must appear before the appellate court, where they are claimed to be essential.

Special Term, December, 1881.

MOTION to resettle papers on appeal from special term to general term.

Buckingham & Paulson, copartners and creditors of Swezey & Dart, who made a general assignment, applied for and obtained an order for the examination of the assignor Dart

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under the general assignment act of 1877. A motion was thereafter made by Dart to set aside the original order directing his examination. The motion was denied and the examination directed to proceed before George B. Pentz, Esq., as referee. Then another motion was made on behalf of Dart for a stay of proceedings, pending a proposed appeal to the general term from the order denying his first motion. The latter motion was also denied. From each of the two orders Dart appealed to the general term.

The papers on appeal from the two motions were bound up together and so served. An opinion of judge VAN HOESEN, which was filed with his decision in the latter motion, was not made a part of the appeal papers served; other important papers used on the motion were omitted, as respondents claimed, including an adjournment signed by Dart in person. Besides, among the printed papers was found an opinion of judge LAWRENCE of the supreme court, said to have been rendered in some equity suit in that court, concerning the same trade-mark "Peerless," which was also the subject of the proposed examination before the referee. The motion comes before the court on an order to show cause why the appeal papers should not be separated so that the papers under each appeal and each order be printed and bound by themselves; why the papers should not be settled so as to contain all used and filed on the motion under which the orders appealed from were made and entered only; and for other and further relief.

Chauncey B. Ripley, for the motion.

I. The papers must be separated; at all events it must be determined by the special term what papers are the basis of each appeal (*Code Civ. Pro.*, secs. 1353, 1356, 1361; *Rules Supreme Ct.*, 40, 41).

II. The absence of judge VAN HOESEN's opinion is fatal (*Rule Supreme Ct.*, 41).

III. The papers specified as used on the motion should all

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be inserted as they appear on the files of the assignment clerk (*Code Civ. Pro.*, sec. 1353).

IV. Those not used and not found on the files should be expunged, including the opinion of LAWRENCE, J. (*Id.* and secs. 1356, 1361).

V. The papers used and filed are enumerated in the orders entered, and they alone should be inserted. Among those are the adjournments; one signed by assignor Dart in person (*Orders on file in clerk's office*).

VI. The motion should be granted, with costs.

Edward K. Jones, opposed.

I. The two orders relate to the same subject-matter, and so need not be separated.

II. The opinion is only required to be inserted under appeals from orders in cases of enumerated motions. These are cases of non-enumerated motions, and the opinion need not be inserted (*Rules 41, 42*).

III. All other papers used are inserted.

IV. The opinion of judge LAWRENCE was referred to by counsel on the argument of the motions at special term.

V. The motion to resettle should be denied.

VAN HOESEN, J. — The papers on appeal are obnoxious to the objections made by Mr. Ripley, and his motion is granted.

The papers submitted on each order should be separated. My opinion should be inserted. The opinion of judge LAWRENCE was never read to me, nor submitted to me; but if it had been, it would not have affected my decision. This observation is not intended to apply any want of respect for judge LAWRENCE, or for his opinions, but is made because that decision has no bearing on the question involved in this proceeding. The indorsement of Dart at the adjournment should appear.

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SUPREME COURT.

THE PEOPLE *ex rel.* LOUIS DEUCHLER and another agt. THE
BOARD OF COUNTY CANVASSERS OF WAYNE COUNTY.

Election laws — Duties of boards of county canvassers — Power of supreme court by writ of mandamus to compel board to reconvene and correct error.

Prior to the passage of the act of the legislature of 1880 (*chap.* 460), the court had not the power to compel a board of county canvassers to reconvene and reconsider their work. By that act, however, whenever it appears by affidavit that error has occurred, the court can reconvene them, and by writ of *mandamus* compel them to correct the error.

The power of the board of canvassers, which is derived only from the statute, which says: "The original statement of the canvass in each district shall then be produced, and from them the board shall proceed to estimate the votes of the county, and shall make such statement thereof as the nature of the election shall require; such statements shall then be delivered to, and deposited with, the county clerk;" imposes upon them purely ministerial duties, and cannot be extended by them beyond a mere count of what appear on their face to be the original returns, and which are apparently regular.

Nothing is committed to the judgment or discretion of the board. Their duty is arithmetical merely. They are to cast up the votes appearing upon the returns of the district inspectors, which are produced before them. They are not authorized to institute any inquiries as to the authenticity of the returns, but are to take those produced before them, if they are regular on their face, and if they are not regular on their face, they must return them to the inspectors for correction.

Where it appeared that at the last general election in this state 629 electors residing in the third election district of the town of Lyons, voted for the various candidates and measures there offered to the people for their suffrages, the board of county canvassers, when in session for the purpose of estimating and determining the number of votes which had been cast in the county, by a bare majority vote, wholly rejected the returns made by the inspectors of the election district, and consequently these 629 voters were not recorded for or against any such measures or candidates:

Held, that a peremptory writ of *mandamus* should be issued requiring the board of county canvassers of Wayne county to reconvene and to receive the original statements or returns of the third election district of the town of Lyons, and to estimate, determine, certify and publish

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the votes therein contained, and to correct their former determination thereon.

Held, further, that although in the operation of the election laws, there may be some essentials entering into the methods of taking and returning the votes by which the inspectors of election, who are in some sort the agents of the electors at large, may violate the statutes to the extent of working in a given case a practical rejection of honest votes, yet it is not the province of the board of county canvassers to adjudge it. They discharge their whole power and duty when, as accurate accountants, they return to the state canvassers the results of the apparently and ostensibly fair figures which may be presented to them.

Wayne Special Term, December, 1882.

Charles H. Roys and Charles McLouth, for relators.

John H. Camp and Joseph Welling, for respondents.

MACOMBER, J. — This is a hearing upon the return of an order to show cause granted on the fourth instant, why a peremptory writ of *mandamus* should not be issued requiring the board of county canvassers of Wayne county to reconvene and to receive the original statement or returns of the third election district of the town of Lyons, and to estimate, determine, certify and publish the votes therein contained, and to correct their former determination thereon.

It appears that at the last general election in this state 629 electors, residing in that district, voted for the various candidates and measures then offered to the people for their suffrages. The respondents, the board of county canvassers, when in session for the purpose of estimating and determining the number of votes which had been cast in the county, by a bare majority vote, wholly rejected the returns made by the inspectors of election of this election district, and consequently these 629 voters are not recorded for or against any such measures or candidates.

The inspectors of the election district were required by law to prepare an original certificate of the votes cast, and to deliver it to the supervisor of the town and to file a duplicate with the county clerk and a copy with the town clerk within

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twenty-four hours of the close of the polls. It is established that they left with the county clerk what purported to be a duplicate or copy of the original at noon of the day following the election, but shortly afterwards borrowed it of the clerk ostensibly to affix the ballots thereon in their proper places; but it was returned at five o'clock in the afternoon of that day, with the ballots properly attached. It was then found that the certificate had been changed in respect to the number of votes cast for member of assembly, by which the whole number was raised from 615 to 623.

At the meeting of the county canvassers a week later, the supervisor presented the original returns as they had been delivered to him by the inspectors; but such original, when opened, also contained a like change in the vote for member of assembly. There is no evidence, however, that the change had been made by the inspectors or tampered with by anybody after its delivery to the supervisor, who was the proper custodian thereof. The board of county canvassers, acting mainly on affidavits that the duplicate or copy which had been filed with the clerk had been changed by the inspectors after filing, and observing that the original, as presented by the supervisor, contained a like change, threw out and rejected from the canvass the entire document. The court is now asked to interpose the greatest power which it possesses, and by its high prerogative writ of *mandamus*, compel the county canvassers to include these returns in the canvass and estimate of the votes of the county.

Prior to the passage of the act of the legislature of 1880, (*chap.* 460), the court had not the power to compel a board of county canvassers to reconvene and reconsider their work. By that act, however, whenever it appears by affidavit that errors have occurred, the court can reconvene them, and by writ of *mandamus* compel them to correct the error. It is a power, however, which ought to be exercised with the greatest caution, and exerted only in cases of palpable clerical errors, or of flagrant abuse of trust imposed in the canvassers.

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The duties of the board of canvassers are clearly defined by statute, which says: "The original statement of the canvass in each district shall then be produced, and from them the board shall proceed to estimate the votes of the county, and shall make such statement thereof as the nature of the election shall require; such statements shall then be delivered to, and deposited with, the county clerk."

The power of the canvassers being thus derived only from the statute, which imposes purely ministerial duties, cannot be extended by them beyond a mere count of what appear on their face to be the original returns and which are apparently regular. Says the court in *Fells case* (11 *Abb. Pr. R.* [N. S.], 206): "Nothing is committed to the judgment or discretion of the board. Their duty is arithmetical merely. They are to cast up the votes appearing upon the returns of the district inspectors, which are produced before them." * * * "They are not authorized to institute any inquiries as to the authenticity of the returns, but are to take those produced before them, if they are regular on the face, and if they are not regular on the face, they must return them to the inspectors for correction" (See, also, *People agt. Cook*, 8 *N. Y.*, 67; and *Bright Lead. Case on Elections*, 305).

But the learned counsel for the respondents urges that the board of canvassers, though bound by the original return, have the right to determine whether it is the original or a spurious return; for otherwise, as they argue, great inconvenience and hardship might be wrought. It is not necessary to inquire what might be done by the board to prevent spurious or forged returns being thrust upon them, for it is an event so remote in the multifarious appliances to secure honest returns, as not to present a subject for judicial speculation. The primary object is to obtain the true returns made by the district inspectors. If they falsify the vote, there is the remedy of the public by indictment and punishment. There also is the remedy of the defrauded candidate by an action at law in the nature of *quo warranto*, by which a false

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title to the office may be challenged and restored to the rightful claimant. If it be a legislative office, there also is the remedy on the floor of the house, which is declared by the constitution to be the judge of the election returns and qualifications of its own members (*Const., art. 3, sec. 10*). In the distribution of responsibility for a fair vote, a correct count and honest returns, in popular elections, a wise economy, alike by statute and judicial decision, has placed the initial obligation on the district inspectors who canvass and return the votes of the smallest political division of the voters, and where mistakes or frauds can affect the least number of citizens. If their returns can be overhauled by the county canvassers, or altogether rejected, as in this case, the minimum of evil, as is now secured, might, through partizanship, be greatly augmented. It seems to me, therefore, to permit the action of this board of county canvassers to stand, would be an invitation to party zeal, through one pretext and another, to make returns and not to count them. For, in this case, there is no forgery or tampering of the returns. Whatever the returns are, they were made by the inspectors themselves. They are responsible for them. There was nothing in the original papers presented by the supervisor which the board had any power to object to. The erasure and amendment were no more serious than the common experience and observation of men are wont to find in the returns of inspectors. The inspectors all testify that the papers handed in by the supervisor were the original returns. The affidavit in opposition, to the effect that a majority of the board of county canvassers did not consider them to be the original, is frivolous. This leads me to say that I reject from consideration all testimony except that which tends to establish or refute the allegation that there was actually before the board of county canvassers the original return of the inspectors.

The result of the action of the board of county canvassers is the disfranchisement of a considerable portion of the electors of the town of Lyons, without fault on their part,

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and without fault on the part of the inspectors of election, in respect to a true tally of the votes actually cast. The constitution declares that no member of this state shall be disfranchised unless by the law of the land or the judgment of his peers (*Art. 1, sec. 1*).

Doubtless, in the operation of the election laws, there may be some essentials entering into the methods of taking and returning the votes by which the inspectors of election, who are in some sort the agents of the electors at large, may violate the statutes to the extent of working, in a given case, the practical rejection of honest votes, but it is not the province of the board of county canvassers to adjudge it. They discharge their whole power and duty when, as accurate accountants, they return to the state canvassers the results of the apparently and ostensibly fair figures which may be presented to them.

The counsel for the respondents urge, as a reason for the non-interposition of the court, that the result would be to give the certificate of election to the assembly to another than the one who now appears to be entitled to it, and that the determination of that matter ought to be left to the legislature. It is hardly necessary to say that such a consideration cannot affect the result of the case. It is a mere incident to the more important question, namely, that persons whose votes ought of right to be counted in the canvass of the state, will be disfranchised unless the court interposes.

Let the order to show cause be made absolute, and let the peremptory writ of *mandamus* be issued, requiring the board of county canvassers forthwith to reconvene and to estimate the votes of the Third district of the town of Lyons, in the words and figures contained in the schedule annexed to the moving papers, and as exhibited by the original return produced in court. Let the order further provide that the relators recover fifty dollars costs of their proceedings, besides disbursements.

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SUPREME COURT.

MARY O'HARA and another agt. WILLIAM H. DUDLEY *et al.**Will — Residuary estate given absolutely to three persons — Letter of instructions to residuary devisees — Effect of — Secret and unlawful trust not established.*

The testatrix, desiring to devote the bulk of her estate to the furtherance of religious, educational and benevolent objects, and being apprised of the difficulty of legally reaching the ends proposed through express provisions in her last will and testament, made in her will an absolute and unconditional gift of her residuary estate to three persons, leaving also a letter of instructions to these residuary devisees and legatees. In this letter, which is not attested and is not referred to in the will, she said she relied upon them, immediately upon her decease, to take such measures as might be necessary to accomplish her wishes. She had been told that the devisees and legatees could spend every dollar in any way they saw fit, and that she must rely on their good faith and sense of right. The plaintiffs brought this action to set aside the residuary clause in the will, claiming that the letter of instructions is to be construed together with the will, and that the whole, form part of one plan to accomplish an illegal purpose, and that the devisees and legatees of the residuary estate take the same under unlawful and void trusts, and therefore, so far as the residuary clause is concerned, it is a fraud upon the heirs at law and next of kin.

Held, that the secret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a devise and bequest.

*Special Term, September, 1882.**Starr & Hooker and Morris & Pearsall, for plaintiffs.**Bengen & Dykman, for defendants.*

VAN VORST, J. — As to the earnest wish of the testatrix to devote the bulk of her estate to the furtherance of the religious, educational and benevolent objects, and agencies, in which she seemed to have a deep personal interest, there can be no doubt. These interests, it is quite clear from the evidence, appeared to have a claim upon her bounty, in so far as

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the disposition of her residuary estate was concerned, superior to that of the plaintiffs, her grandchildren. She clearly so thought, and acted accordingly. She earnestly urged upon her counsel, who had prepared wills for her, before the one under consideration, her wish to give the bulk of her estate to charities, as she did upon the lawyer who prepared her last testament. Although the specific objects she desired to foster were, in a general sense, present to her mind, and were mentioned by her, yet the methods through which her benevolence in their favor might be consummated were, in part at least, vague and indefinite, and were difficult of being formulated in a manner which would meet the exact demands of the law. At least such was the opinion of the legal advisers, and she was told by them that she could not legally reach the end proposed by her, through the instrumentality of a last will and testament.

The difficulty was overcome, as the testatrix evidently believed or hoped, by an absolute and unconditional gift of her residuary estate to the defendants, Dudley and McCue and Robert I. McGuire, as joint tenants. These persons were also constituted executors of her will, in which the gifts to them was made.

Contemporaneously with the making and execution of her will, there was prepared by the legal adviser of the testatrix, a writing, which was signed by her, in which she says: "Having this day made a new will * * * I wish my residuary legatees to consider the instructions heretofore given by me as still in force. February 14, 1876."

The instructions referred to in this memorandum are contained in a writing, signed by the testatrix the 8th day of June, 1875, on the occasion of her making a previous will. The paper containing these instructions is addressed to the residuary devisees and legatees by name, in which she, among other things, says:

"I am desirous of accomplishing certain purposes, some of which at least cannot be legally carried out by express

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provisions in my will, and, therefore, in order more certainly to effect my purposes, I have constituted you as such residuary devisees and legatees, relying upon you that you will, immediately upon my decease, take such measures as may be necessary to accomplish my wishes."

These purposes, which are religious, charitable and educational, are distinctly mentioned in the paper. This paper, containing instructions, was prepared by judge McCue, who drew the will of that date, and was left by him, after its execution, with the testatrix, and was produced by him from the box of the testatrix before the surrogate of Kings county upon the occasion of the probate of the will. It does not appear that either of the residuary devisees and legatees other than judge McCue knew of the existence of this paper before the death of the testatrix, although they knew of the desire of the testatrix that a portion of her estate, should be devoted to charitable purposes.

Dudley, one of the devisees and legatees, testifies that he did not know until after the death of the testatrix that she had given anything to him, and that he had never directly or indirectly promised her to devote the bequest to him, to charity. That she had, however, asked him to act as an executor, and had told him that her executors would have sums left to them to be disposed of in charity at their discretion. The other devisee and legatee, McGuire, is dead, but it does not appear that he knew, before the testatrix's death, that he was one of the residuary legatees.

The testatrix was told in substance by the lawyer who prepared the will, that in order to accomplish her purposes, of which she had advised him, she must take one of two courses. One was to rely on the moral obligation and good faith of the persons she chose to confide in, to carry out her wishes, or to make a will that would raise serious questions as to its validity. She was told that the devisees and legatees could spend every dollar in any way that they saw fit; that

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she must rely simply on their good faith and on their sense of right.

The defendant McCue had on previous occasions explained the matter to the testatrix, and the risk she ran. In speaking of the contemplated gifts to himself and the other devisees and legatees, he had told her that in his judgment, that was the only way in which her wishes could be carried out; that she would have to trust them; that it was, however, a pure matter of honor; that the devisees and legatees would in no sense be responsible or accountable to the beneficiaries; that they could pocket the money if they felt so disposed, and thus disappoint all her expectations. Her reply was, "that she thought she could trust them." He also told her that the letters of instruction were not a will or anything in its nature. And the learned gentleman who wrote this will says the entire will was read to the testatrix in the presence of the witnesses, and that he then told her that this made judge McCue and the other residuary devisees and legatees "absolute owners of the residuary estate, and that they could do what they pleased with it;" that the will gave the property absolutely, and that the letters of instruction had no legal effect.

It is now claimed on the behalf of the plaintiffs, who are the only surviving next of kin and heirs at law of the testatrix, that the devisees and legatees of the residuary estate take the same under secret, unlawful and void trusts, and that for such reason the gifts to them under the will are invalid, and that the next of kin and heirs at law are entitled to the residuary estate.

It is a general rule that an absolute devise of property cannot be changed by extrinsic evidence into a gift of an inferior nature, or be clogged with a trust. A last will and testament executed and attested with all the formalities of law is the highest and in general, the only expression of a testator's intention, with regard to the quality and extent of the testamentary gift which he has made.

It is a rule that if the intended disposition of property be

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of a testamentary character, and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative unless it be declared in writing, in strict conformity with the statutory enactments regulating devises and bequests (*Lewin on Trusts*, p. 66). From which it follows that parol evidence cannot be received to convert a devisee under a will, in writing, into a trustee (*Perry on Trusts*, sec. 94).

The letters of instructions are not attested in the presence of witnesses, nor are they executed as a will, and can in no legal sense be regarded as a testamentary disposition of property. In the will itself, which is well executed, and which has been admitted to probate, no reference is made to these letters in any way. So that they cannot be regarded as any part of the testamentary disposition of which the will is the only evidence. And where even there is something on the face of a will which tends to show that the gift was not absolute, or that it was in trust, and the trust was not sufficiently declared, yet it would not be admissible to show, by a paper not signed and attested as a will, that a trust in favor of any particular person or object was intended. But in such case, it appearing by the will itself that the gift was in trust only, the property would descend to the heirs at law (*Addington agt. Cann*, 3 *Atk.*, 151; *Lewin on Trusts*, *supra*). But to the general rule that a trust cannot be created by a testamentary disposition, or by an instrument in its nature, except through the formalities required by the statutes respecting wills, there are exceptions, arising from cases of fraud. As in the case of one who seeks to secure to himself the succession of property by fraud and deceit practiced upon the testator, to the injury of one to whom the estate would have passed but for the fraud; under which circumstances the devisee or legatee, upon proof of the fraud, may be turned into a trustee, and be compelled to execute the disappointed expectation.

Another exception also arises in the case of a fraud upon

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the law, meditated by a testator and a proposed devisee or legatee, sought to be effectuated, although the gift be absolute, through a secret arrangement or trust of an unlawful character, coincident with the execution of the will, by which the devisee or legatee engages to use or apply the property, to objects and purposes condemned by the law. In such case the secret trust can doubtless, be established by evidence *dehors* the will. Cases of this character have arisen in England, through dispositions of property attempted to be made by will, accompanied by secret arrangements in fraud of the statutes of mortmain, of which the following are illustrations: *Russell agt. Jackson* (10 *Hare*, 204); *Jones agt. Badley* (*L. R.*, 3 *Eq.*, 635); *Springett agt. Jennings* (*L. R.*, 10 *Eq.*, 488). But the case under consideration here, shows no attempt on the part of the devisees to defraud the testatrix. The whole subject was freely discussed between the testatrix and her legal devisers, one of whom was a devisee, and she made just such a disposition in the end as she intended.

There is not the slightest reason to believe, from the evidence, that any fraud or misrepresentation was practiced by the devisees or either of them, to obtain a gift in their favor to the prejudice of the next of kin or heirs at law of the testatrix. The property she attempted to dispose of was her own. She considered, under the evidence, the claims of her kindred. She gave legacies to the plaintiffs, and disposed of the residue of her property as she preferred. She gave to the residuary devisees and legatees her residuary estate absolutely in the clearest terms. It was her earnest desire and wish, however, that it should be used by them and applied to charitable purposes which she indicated. But she also comprehended that her expectations might be defeated through the absolute gift of the property to them; that as they took the property, by the terms of the will, unconditionally, they might use and spend it as their own without accountability to anyone.

There may be a moral obligation resting upon the devisee

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who knew of the letters of instruction, who in fact drew them, to apply the property, in so far as he can control it, as the letters of instruction direct; but that is a subject addressed to the consciences of the devisees. But should they disregard the moral obligation arising from the facts and circumstances, I do not see that the beneficiaries have any stable grounds for legal or equitable relief against them founded upon the idea that they hold the property upon a trust which the courts can enforce.

"The averment of a trust was never permitted as against a devisee. A devise, as was resolved in *Vernon's case*, implies a consideration, and therefore cannot be averred to the use of another, for that, observes Lord Chief Baron Gillert, were an averment contrary to the design of the will appearing in the words" (*Lewin on Trusts*, 58; *Gilbert on Uses*, 162).

This conclusion in its scope, it appears to me, of itself, disposes of this case in opposition to the plaintiffs' contention. But it is proper, however, to consider the question as to whether the scheme of this will, with the letters of instruction, was concocted to defraud the law, or whether any statute would be violated by the application, through the devisees and legatees, of the moneys given to them to the purposes, or to secure the ends designed by the testatrix.

Whether the purpose is unlawful depends upon the object designed to be secured by the gift. That the views of the testatrix were vague and indistinct and incapable of being formulated so as to avoid question as to whether a court of equity could enforce them, and the object was sought to be reached through the discretion and judgment of those in whom confidence was reposed, is no fraud upon the law, and affords no good reason for turning an absolute devise into a trust for the purpose of adjudging it to be void as an attempt to evade a statute. Such a case is widely different from those arising under the English statutes of mortmain, which were direct attempts to evade statutes interdicting gifts to charities. And it also differs from the case of *Schultz's appeal* (80 *Penn. St.*, 396), in

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which the claim was that although the bequest was absolute, yet it was the testator's expressed intention that the moneys so given should be applied by the legatee to charitable uses. By a statute of Pennsylvania testamentary gifts to charities were declared to be invalid if the will was executed within thirty days of the testator's death. In that case the attempt clearly was to evade the statute. The testator died within thirty days after making the will. That case was decided against the heirs and next of kin upon the ground that the legatee was ignorant of the testator's intention as to the manner in which the moneys were to be applied, and had not assented to the arrangement before the testator's death. But judge SHARSWOOD, in the course of his opinion in that case, suggests that if the legatee had known the testator's intention, and had agreed to take the bequest for such charitable uses, it would have been void under the statutes, and the property would, by force of the same, have gone to the heirs and next of kin of the testator.

The real vice in all these cases, therefore, is that gifts were in fact made to charities which were interdicted by statutes.

In this state there exist statutes similar to the Pennsylvania law, but there is no claim here that any such statute is violated by the will under consideration. There is no law of this state which prohibits testamentary gifts for the education of poor young men for the priesthood, nor for the purchasing of shoes for poor children attending parochial schools connected with any religious society; nor for any of the benevolent purposes in testatrix's mind, and mentioned in the letters of instruction.

It is quite true that as strict trusts, if contained in a will, from the terms used, a court of equity might find it difficult to enforce them, and might not for that reason uphold one or more of them. But the conclusive answer to that suggestion is embraced in what has been already stated, that they are not trusts contained in a will, and are not to be sustained

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as testamentary dispositions. Addressed as they are to the consciences of the devisees and legatees they may or may not be carried out. Whether they are or are not will depend upon the power of the moral obligation, under which the devisees or either of them rests.

But it is urged on the plaintiffs' behalf that it was the intention of the testatrix to create a perpetuity, and to institute trusts which are not allowed by statute, and that the letters of instructions indicate her wishes and purpose in that regard. But I cannot think that the conduct and action of the testatrix was the outcome of any such intention. The discussions between the testatrix and Mr. Cullen, the lawyer who prepared the will, after receiving her instructions, do not appear to have touched those subjects.

According to the testimony of judge CULLEN, the testatrix wanted the money to go to certain charities. He told her, in substance, that she could not accomplish her purposes by a will. Some of these purposes were the education of certain persons for the priesthood. The difficulty in the mind of the counsel was, that unless the object of the charity was well defined, or unless there was a corporation in existence competent to take, a legacy for such purposes would be void, and that it was questionable whether words merely precatory would create a trust. It seems to have been believed that some of the organized charities, the testatrix wished to favor, were unincorporated. There is no statute which interdicts testamentary gifts to voluntary associations. But, as fluctuating bodies, courts of equity find it difficult to deal with them or enforce trusts in their favor, and devises and bequests to them have been held to be void.

The testatrix, while living, could have directly given moneys to unincorporated societies for charitable purposes, and the moneys would have been legally received and could have been retained and applied. There are cases where gifts of money for purposes condemned by law may be recovered back, and had it been within the contemplation of the testa-

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trix to foster, through her testamentary gifts, by indirection, immoral purposes, or such as are directly forbidden by statute, a case wholly different would be presented. That the testatrix earnestly wished and believed that she had cast upon her devisees and legatees a moral obligation, through her gifts to them, to sustain voluntary associations organized for charitable ends, cannot be positively illegal.

It is said in the letters of instructions that the residuary legatees and devisees should keep in mind the earnest desire of the testatrix to secure for herself and family the benefit of the "Holy Sacrifice of the Mass," and that they should enjoin and impose, so far as they could, the obligations upon the recipients of the moneys. These at best are but precatory words, and do not in terms or in legal effect amount to a trust.

In a case of this character, where it is sought to raise a trust, or trusts upon an absolute devise, for the purpose of defeating it, as a fraud upon statutes, the intention of the parties must be fairly considered, and the letters of instructions must be read in the light of all that was said upon the subject at the time it was prepared and executed. And we are not called upon to characterize this transaction as a fraud upon the statute, or as a conspiracy to cheat the law, where the matter is explicable upon grounds, as we think it is, which do not show such design.

Limited by the wish that the devisees and legatees should use the moneys for the charitable purposes above indicated, the evidence shows that the largest discretion was designed to be exercised in the application of the moneys. This may, and we may presume will, be accomplished if the residuary devisees and legatees yield to the force of the moral obligation, without violating any statute.

The conclusion reached is that the secret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a devise and bequest.

By this conclusion the plaintiffs, the heirs-at-law and next of kin of the testatrix are disappointed in not securing what

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they supposed was not well given away. But the testatrix, if the conclusion reached is correct, had the legal power to make her will in the way she selected.

It is not in the power of this court to correct the conclusions or judgment of a testator as to the disposition of his property, nor to defeat his will in that regard, so long as the dispositions made, are valid in the law. The reasons which influence men in turning their property in one direction rather than another, are not open to investigation in legal tribunals, so long as they possess testamentary capacity, and the dispositions made are not invalid and fraud and undue influence are absent.

There must be judgment for the defendants, dismissing the plaintiffs' complaint, but without costs.

SURROGATE'S COURT.**In Matter of Estate of WILLIAM A. BATCHELOR.**

Practice — as to citation on applying for administration with the will annexed — Code of Civil Procedure, section 2644.

A creditor having only an inferior right to administration, dependent on the renunciation or disavowal of the right by all others who had a prior right, must proceed by petition and citation; and since by the Code of Civil Procedure (sec. 2644), it is provided that "the petition must pray that all persons having a prior right, who have not renounced, be cited to show cause why administration should not be granted to the petitioner," a creditor cannot take a citation to show cause why administration should not be granted to the public administrator. The proposed administrator, with the will annexed, must himself be a petitioner.

New York County, January, 1883.

ROLLINS, S. — In February last Mary A. Batchelor, executrix of one Charles Batchelor, deceased, and claiming to be, as such, a creditor of decedent's estate, presented to the surro-

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gate a petition alleging that the will of decedent had been admitted to probate in the state of Maryland, and that an exemplified copy thereof had been filed in this court. The petition also averred that testamentary letters had been issued in Maryland to decedent's widow, Lucretia A. Batchelor; that there were unadministered assets of the estate in the county of New York; that decedent had left him surviving several next of kin and heirs-at-law, whose names were set forth; that Lucretia A. Batchelor had been cited to appear and qualify as executrix, or show cause why she should not be deemed to have renounced; that she had failed to appear, and that thereupon an order had been entered declaring her to have renounced. The petition then prayed for a citation to the said next of kin and heirs-at-law, to appear and show cause why letters of administration with the will annexed in decedent's estate should not be issued *to the public administrator of this county*. A citation was thereupon issued, which in an important particular failed to conform to the prayer of the petitioner; for it cited the parties to show cause why letters of administration with the will annexed should not be granted *to the petitioner herself*.

This citation was returned in April. It is claimed that the service upon some of the parties was worthless, but it is unnecessary to pass upon that contention, for reasons which will presently appear.

The petitioner seems to have thought fit to abandon this proceeding, and in June, 1882, she asked and obtained leave to withdraw the petition above referred to, and to file another in its stead. The new petition contained allegations similar to the other, and added to the various persons originally named as the next of kin and heirs at law, had, with the single exception of William A. Batchelor, failed to appear on the return day of the citation. It prayed for a citation to William A. Batchelor (but to no other persons whomsoever) to appear and show cause why letters of administration, with the will annexed, should not be granted *to the public administrator*.

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A citation was issued in strict conformity with the second petition, and seems to have been duly served.

Upon the proceedings above recited, I am not warranted in granting either original or ancillary letters of administration with the will annexed.

1. Not ancillary letters: The Code prescribes, by sections 2697, 2698, 2699, to whom such letters shall issue and what steps shall be taken to procure their issuance. Those steps have not been taken in the present case, and neither the petitioner nor the public administrator, in whose behalf she applies, shows any title to letters ancillary.

2. If it be assumed that in such a case as the present a grant of original letters might lawfully be made upon a proper application, it is plain that they cannot be issued upon the papers now before me.

Sections 2643 and 2644 of the Code establish the procedure by which the authority of the court in this regard must be set in motion. The former section prescribes the order of priority of right to the letters. The latter provides that an application for their issuance must be made by petition, unless every person having a prior right has renounced, and that such petition must pray that all persons having a prior right, and who have not renounced, be cited to show cause why administration should not be granted *to the petitioner*.

In the present case the applicant asks that a citation issue to the respondent, William A. Batchelor, to show cause why letters should not be granted *to the public administrator*, and the citation corresponds with the petition.

The applicant, if she desired to initiate these proceedings, should have asked for her own appointment, and should have cited the public administrator and such other party or parties as were entitled in priority to letters of administration with the will annexed.

Petition dismissed.

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N. Y. COMMON PLEAS.

In the Matter of the Assignment of JOHN A. SWEZEY and JOSEPH DART, and the examination of Dart as a witness.

Jurisdiction — Adjournment — Appearance — Discretion — Trade-mark — Title — Burtnett Case (8 Daly, 363) — Examination before referees of assignor — Scope of such examination — Section 24, general assignment act of 1877.

Section 24 of the general assignment act provides that any act or proceeding commenced or returnable before or instituted or ordered by one judge, may be heard, continued or completed before any other.

Where, on the return of an order directing the examination of an assignor, he appears on the return day, and the record so indicates, such appearance is presumably before the same judge. The examination of witnesses under this statute (*The General Assignment Act of 1877 and amendments*) rests entirely within the discretion of the court; and applications therefor should be granted only in those cases where benefit will probably result to the assigned estate or those interested therein.

Whether or not the title to a trade-mark, passed under a general assignment is not a question involved on the examination contemplated by the statute. The facts which may control such a proposition, if within the knowledge of the assignor, whose examination is sought, may be properly brought out on such examination. Information upon that subject is proper in aid of the assignment and inquiry is permissible. The Burtnett case (8 *Daly*, 363) distinguished and held to have no application to the one at bar.

The provisions in the order prescribing the scope of the examination should be modified so as to make the examination conform to the foregoing views.

General Term, June, 1882.

Before VAN BRUNT, C. J., J. F. DALY and BEACH, JJ.

THESE are two appeals; each from an order of special term.

First. An order dated December 14, 1881, duly made for the examination of assignor Dart, as a witness on behalf of creditors Buckingham and Paulson, on the fifteenth November last. The witness appeared and was sworn, and adjourn-

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ments taken until fourteenth December, when Dart's attorneys appeared and moved to set aside the order on two grounds (1) because it was made by his honor JOSEPH F. DALY, at chambers, and his honor judge VAN HOESEN was sitting at chambers on the adjourn day; (2) for want of jurisdiction.

Robert S. Green and Edward K. Jones, for appellants.

I. The motion below could be heard only by the judge who granted the order to show cause in the first instance, to wit, judge JOSEPH F. DALY. It was heard by some other judge, which was error.

II. The court below had no jurisdiction.

Chauncey B. Ripley, for respondents.

I. The first objection, to wit, that the order was returnable before judge JOSEPH F. DALY and could not be heard by judge VAN HOESEN, is untenable (*Rules Supreme Court*, 37, p. 133).

II. The second objection, want of jurisdiction, is untenable, because the statute expressly provides for the examination (*General Assignment Act*, sec. 21, p. 20).

III. No other objections were made below, none other can be considered here therefore. Besides, witness Dart had waived all objections in the act of being sworn and by signing the adjournment. The order of fourteenth December should be affirmed, with costs.

Second. An order dated December 17, 1881, denying an application for a stay of proceedings under the order of fourteenth December. No papers were used on the motion, except the affidavit of Jones, verified thirteenth December. That affidavit was made before the order was made, as appears, affidavit thirteenth December, and order fourteenth December.

Robert S. Green and Edward K. Jones, for appellants. The *Burnett* case is precisely in point, where the chief justice refused a similar application (8 *Daly*, 363). The stay should have been granted.

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Chauncey B. Ripley, for respondents.

I. It does not appear on what, if any ground, the stay was asked. It was without notice, as the Code requires (*sec. 775*), and the judge could hardly have granted it on the application. If it was a stay pending an appeal, notice and security should have been given, under the Code, and in accordance with the practice, unless waived (*Code Civ. Pro., secs. 1305, 1312*).

II. Moreover, the opinion filed by judge VAN HOESEN is a complete answer to all questions involved (*Opinion of judge VAN HOESEN, Matter of Swezey, 62 How. Pr., 215, 218-220*).

III. The appeal should be dismissed with costs and disbursements, and costs of court below.

BEACH, J. — This is an appeal by the assignor Dart from two orders of the special term, one refusing to vacate an order for his examination and the other directing the examination to proceed before a referee. The original order was granted upon the petition of creditors of the estate, averring title to a valuable trade-mark in the assignors at date of the assignment, and that the assignee had not reduced it to possession. The objections appearing in the first order appealed from relate to its being returnable only before the learned justice who granted it, and for want of jurisdiction. The answer to the first objection is that it would appear from the record that the witness appeared on November eighteenth, and presumably before the same judge. But were it not so, any act or proceeding commenced or returnable before, or instituted or ordered by one judge, may be heard, continued or completed before any other (*General Assignment Act, sec. 24*). I can imagine no reason for the objection to jurisdiction.

The examination of witnesses under this statute rests entirely within the discretion of the court, and applications therefor should be granted only in those cases where benefit will probably result to the assigned estate, or those interested therein.

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Whether or not this so-called trade-mark passed by the assignment is a question not here involved. The facts which may control such a proposition are within the knowledge of the assignor, whose examination was directed. Information upon that subject it is proper for the creditors to have, because the inquiry is in aid of the assignment, and may be useful to them in promoting action by the assignee, or as a basis for a proceeding against him for a violation of his duty in not preventing illegal use of the name. The examination of witnesses denied *In Matter of Burnett* (8 *Daly*, 363), was one destined to involve matters within the issues of an action to be brought, and not for pertinent information preliminary to the suit. The application was made by the assignee, who appeared to have all the knowledge necessary for the assertion of his rights.

The order of December seventeenth, directing the examination to proceed before a referee therein named is, in my opinion, too broad in its terms. The portion thereof between the sentence, "To ascertain whether or not certain property called a trade-mark belongs to the assigned estate," and the last clause relative to books and papers should be stricken out.

The order denying motion to vacate original order should be affirmed, and also the succeeding order as hereby modified, without costs of this appeal to either party.

VAN BRUNT, C. J., and J. F. DALY, J., concur.

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SUPREME COURT.

The People on Relation of JOHN SANDERSON agt. HOMER H. PAYNE, WILLIAM O'HARA and ALVIN S. HAYNES, inspectors of election of the first election district of the town of Hunter, in the county of Greene.

Election law — Duties of inspectors — When mandamus will issue to inspectors, commanding them to reassemble and make a full and true return of votes for each candidate for a certain office.

When a return from an election district which had been made to the board of county canvassers has, by order of the court, been sent back to the district inspectors for correction, on motion for a *mandamus*, directed to the district inspectors, commanding them to reassemble and make a full and true return to the board of county canvassers of all the votes cast for each candidate for a certain office, and the affidavits showed that the error, if any, was made by incorrectly adding the votes counted by each inspector :

Held, first, that the right to have such a return made does not depend upon the present allegations of the inspectors, but upon the fact that their own statements and affidavits in regard to the result in their district has been so conflicting and confusing that the parties interested, and the people, are entitled to have them reassemble, and, after deliberation and consultation, certify under their hands, in a formal and official manner, a true statement of the result at their poll. The public are entitled to such a statement in an official form to have all doubts solved, and to hold such officers responsible if they certify falsely.

Second. The writ is necessary so that the individuals comprising the board of inspectors may meet for consultation, and then give the result of such consultation.

Third. An affidavit of two of the inspectors that the returns as made to the board of county canvassers is "substantially" accurate, and that if they meet as a board of inspectors they cannot change the same in any "material" particular, is not sufficient. They are not to judge whether or not the correction, if made, will be "material."

Fourth. The people are entitled to have a detailed statement of the result at their poll. What they shall return, the court does not direct, but it demands and must have from them a written statement, full, clear and explicit, of what they are willing to declare, over their official signatures and upon their official oaths, is true in regard to the votes cast for each candidate for the particular office.

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Held, further, that as confusion and error appears from their own affidavits to have occurred in the gross result by the addition of the separate counts of ballots by each inspector, that they should be required to separately return the votes counted by each inspector.

Ulster Special Term, December, 1882.

APPLICATION for a peremptory *mandamus*.

J. I. & F. Werner and *James B. Olney*, for relator.

John A. Griswold, for Payne and O'Hara, opposed.

WESTBROOK, *J.* — Upon affidavits and evidence which seemed conclusively to establish the fact that the inspectors of election of the first election district of the town of Hunter had not made an accurate return of the votes cast in such district for the office of county judge of the county of Greene, at the election held in November last, this court, by order made at special term, directed the return from such election district, which had been made to the board of county canvassers, to be sent back to the district inspectors for correction.

In directing the board of county canvassers to send such return back to the inspectors for correction, this court held — 1st, that until a correct return had been made of all the votes cast for each candidate for the office of county judge at the late election, the inspectors had not discharged their duties under the law; 2d, that when duties devolved by law upon an officer had not been discharged, this court had power to compel and direct their discharge (*Matter of Broadhurst*, 16 *Johnson*, 8; see pages 13 and 14, and cases there cited); and, 3d, that the first step to be taken in the premises was the sending back of the returns to the inspectors for correction (*See S. C., ante*, 201).

A motion is now made by the relator for a *mandamus*, directed to the district inspectors, commanding them to reassemble and to make a full and true return to the board of county canvassers of all the votes cast for each candidate for

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the office of county judge, and, as the affidavits submitted upon the original motion against the board of county canvassers as well as those presented upon the present one showed that the error, if any, was made by incorrectly adding the votes counted by each inspector, that they should also separately return the votes counted by each inspector. To the present application various objections are made, which will be considered :

First. The affidavits of two of the inspectors (Payne and O'Hara) are presented, who depose that the return as made to the board of county canvassers is "substantially" accurate, and that if they meet as a board of inspectors they cannot change the same in any "material" particular. Their counsel then argues that, as the foundation of the proceeding — the inaccuracy of the first return — is disputed, this court has no power to award a peremptory *mandamus*.

To this objection there are several answers :

1st. It is conceded that the court should not grant the writ asked for in a peremptory form, when the facts upon which it is demanded are in dispute, but that proposition can have no application to the present case. It is not proposed by the order sought to decide any question of fact contrary to the assertion of the respondents as to what the truth really is. The effect of the writ when granted will be to cause them to assemble in their official capacity as a board of inspectors of election, and to certify and return as such, upon their official consciences and responsibilities, a true and correct statement of the votes cast for each candidate for the office of county judge of the county of Greene at the late election. The right to have such a return made does not depend upon their present allegations, but upon the fact that their own statements and affidavits in regard to the result in their district have been so conflicting and confusing that the parties interested and the people are entitled to have them reassemble, and, after deliberation and consultation, certify under their hands, in a formal and official manner, a true statement of

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the result at their poll. The public is entitled to such a statement in an official form to have all doubts solved, and to hold such officers responsible if they certify falsely.

2d. The writ is necessary so that the individuals comprising the board of inspectors may meet for consultation, and then give the result of such consultation. In law, when duties are confided to a board, it is not at all important to know the individual and separate views of each person comprising it prior to meeting as a board, but their joint views or the views of a majority of them after and upon official consultation are required. The reason of this is obvious. Recollections and opinions of individuals are often changed by consultation, and those of Messrs. Payne and O'Hara may be, after consultation and deliberation with their associate. This result can only be attained by allowing the writ.

3d. The answering affidavits of Payne and O'Hara are not satisfactory. They do not unequivocally state that their first return is correct in all respects and particulars. They only declare that they can make no "*material*" change. They are not to judge whether or not the correction, if made, will be "*material*." Of that the court will judge when they have certified the particulars of the count.

Second. It is also claimed that the inspectors have met, and that a majority has certified to the board of canvassers of the county that there are no errors to be corrected. To this there are also several answers :

1st. Mr. Haynes, one of the inspectors deposes that there has been no such formal meeting. He details such facts and circumstances attending their hasty assemblage, as to justify the conclusion that there has been no meeting in such form as the law contemplates. There should be consultation between the officers free from the interruptions and suggestions of others. Their action should not be influenced by outside pressure from friends of interested candidates. When they deliberate, they should exclude spectators, and after a quiet conversation and consultation, they should affix their

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names to a statement showing the result of the poll; and they should do it in view of their official responsibility and accountability.

2d. The return as made is not what is wanted. It contains the same vice that the affidavits do. Their declaration that there are no "material" errors in their former return, is not sufficient. The people are entitled to have a detailed statement of the result at their poll. What they shall return the court does not direct, but it demands and must have from them a written statement, full, clear and explicit, of what they are willing to declare, over their official signatures and upon their official oaths, is true in regard to the votes cast for each candidate for the office of county judge in their district.

Having thus hastily and briefly answered the objections made to the issue of the writ, it is proper to add a word or two as to the direction asked for to return separately the count of each inspector. As there is no express statutory command to the inspectors to make such a declaration, some doubt suggested itself to my mind as to its propriety. Reflection, however, satisfies me that the directions should be given. It is the duty of this court, and it has the power, to compel the inspectors of the election district to discharge theirs. It is vital to know the true result of the vote cast for each candidate for county judge. Confusion, certainly, as appears from their own affidavits, and error also, as alleged, has occurred in the gross result by the addition of the separate counts of ballots by each inspector. To remove such confusion, and to correct such error, if any there be, it is necessary that this statement should be made. As the court has power to compel a true declaration of the result to the board of county canvassers, it must also have the power to direct that to be done upon which, in its judgment, the ascertainment of the truth depends.

For the reasons which have been given, the writ, in the form asked for, must issue.

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SUPREME COURT.

WILLIAM D. MURPHY agt. WILLIAM H. ENGLISH.

Election law — Action — Contract to compensate a person to speak in public and advocate the election of a person to office, not a violation of the statute imposing penalties for violation of election laws — 1 R. S. (6th ed.), 452, section 6.

By statute of this state, imposing penalties for violation of election laws, it is a misdemeanor for any candidate for an elective office, with intent to promote his election, or for any other person in his behalf, to furnish entertainment or money to procure or compensate voters, or to contribute money for any other purpose intended to promote an election of any particular person or ticket (1 R. S. [6th ed.], 452, sec. 6), except for defraying the expenses of printing and the circulation of votes hand-bills and other papers previous to any such election, or for conveying sick poor or infirm electors to the polls.

In an action to recover compensation for making certain speeches in the state of Indiana, under an alleged employment by defendant, the defendant set up as a defense in his answer that "the alleged contract was and is against the policy of the common law, repugnant to the constitution and laws of the United States, against public policy, and void. On demurrer to this defense:

Held, that no authority had been found to show that it is an offense at common law for a candidate for a national office, who could not personally present his individual views of national policy over a wide area of constituency, to employ and compensate a person for that purpose:

Held, further, that the pleadings not showing when the alleged contract was made, but all agreeing that it was to be fully performed in the state of Indiana, and there being no averment in the answer that the alleged contract is void by the law of that state, that fact cannot be assumed, and the penal statutes of this state have no extra territorial jurisdiction.

Special Term, February, 1883.

It is alleged in the complaint in this action that the defendant, who was the nominee of the national democratic party for vice-president, on or about August 20, 1880, employed the plaintiff to speak in public in defendant's behalf and advocate his election to office throughout the state of Indiana;

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that plaintiff went from this state, where he then resided, to Indiana, and from September 4 to October 12, 1880, made twenty-five speeches in different places in that state in pursuance of such employment; that his services were reasonably worth the sum of \$1,000, upon account of which he has received \$100; that he has also paid out for traveling expenses \$280. He asks judgment for \$1,180, with interest.

The defendant in his answer denies the employment, and all the substantive facts alleged in the complaint. He admits that plaintiff addressed some public meetings in Indiana, but avers that the speeches made were poor and not worthy of compensation. That plaintiff spoke of his own desire and in his own interest; that the alleged contract was and is against the policy of the common law, repugnant to the Constitution and laws of the United States, against public policy, and void.

To this last and separate defense the plaintiff demurs.

T. C. Ecclesine, for plaintiff.

Algernon S. Sullivan, for defendant.

LARREMORE, J.—By statute of this state, imposing penalties for violation of election laws, it is a misdemeanor for any candidate for an elective office, with intent to promote his election, or for any other person, in his behalf, to furnish entertainment or money, to procure or compensate voters, or to contribute money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing and the circulation of votes, hand-bills and other papers previous to any such election, or for conveying sick, poor or infirm electors to the polls (1 *R. S.* [6th ed.], 452, sec. 6.). This statute was the subject of judicial interpretation in *Walker agt. Jackson* (5 *Hill*, 27), in which it was held that a "log cabin," which was used to promote the success of a particular candidate, by furnishing entertainment for voters, was a violation of its provisions. This decision, sustained by the court of errors,

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in the face of a large dissenting vote (7 *Hill*, 387), was followed in *Hurley* agt. *Van Wagner* (28 *Barb.*, 109), and *Sizer* agt. *Daniels* (66 *Barb.*, 426), with a distinct utterance that its doctrine should not be extended.

No authority has been cited to show that it is an offense at common law for a candidate for a national office, who could not personally present his individual views of national policy over a wide area of constituency, to employ and compensate a person for that purpose.

The pleadings do not show where the alleged contract was made, but entirely agree that it was to be fully performed in the state of Indiana. There is no averment in the answer that the alleged contract is void by the law of that state, and that fact cannot be assumed.

Penal statutes of this state have no extra territorial jurisdiction (*Commonwealth of Kentucky* agt. *Basford*, 6 *Hill*, 526; *Ormes* agt. *Hauchy*, 82 *N. Y.*, 443).

If the contract in question was void under the law of the state of Indiana, that should have been pleaded as a fact, and issue taken thereupon.

The plaintiff is entitled to judgment upon this demurrer, with leave to the defendant to amend his answer.

N. Y. SUPERIOR COURT.

JOHN G. BROOKS *et al.* agt. THE MEXICAN NATIONAL
CONSTRUCTION COMPANY.

Jurisdiction — Foreign corporation — Superior court no jurisdiction of an action brought by a non-resident against a foreign corporation — Objection may be taken advantage of at any time — Code of Civil Procedure, sections 266, 267, 1780.

The superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer.

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TRUAX, J. — If the plaintiffs' view of the meaning of sections 266 and 1780 of the Code of Civil Procedure is the right one, this court would have jurisdiction of an action brought by a non-resident against a foreign corporation where the supreme court has not jurisdiction. I do not think that such was the intention of the legislature. Section 1780 provides that, in certain cases only, shall any of the courts of this state have jurisdiction over a foreign corporation in actions brought by a non-resident plaintiff, and there mentions the cases. This case is not one of the cases mentioned in that section. But, the plaintiffs contend, section 266 provides that the jurisdiction of a superior city court must be presumed, and that a want of jurisdiction by reason of the non-existence of any of the jurisdictional facts specified in section 263, is a matter of defense and is waived by the appearance of the defendant, unless it is pleaded in defense, and that the defendant not having pleaded that the plaintiffs are non-residents, he cannot raise the question of jurisdiction on a motion to vacate an attachment. Such, however, is not the meaning of those sections. They mean that the plaintiff need not set forth in his complaint that the contract sued on was made, executed or delivered within the state, or that the cause of action arose within the state, or that a warrant of attachment has been actually levied within this city, or that the summons has been actually served within this city, but that, in a case in which the supreme court has jurisdiction, if the non-existence of these facts is not set up in the answer, the court will presume that they do exist.

I am therefore of the opinion that this court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and that the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer.

The motion to vacate the attachment is granted, with ten dollars costs.

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N. Y. MARINE COURT.

ALBERT HIRSCH agt. ROBERT J. HUTCHISON.

Attachment — Copartners — Fraudulent transfer by one partner of his interest in the firm to his copartner good ground for an attachment — Code of Civil Procedure, sections 227, 635, 638.

An attachment is justified in favor of a creditor on a joint demand for goods sold and delivered when one of two copartners, who are jointly and individually insolvent, makes a fraudulent transfer of his interests in the firm to his copartner.

Special Term, January, 1883.

MOTION to vacate attachment.

Henry Arden, for motion.

Frankenheimer & Rosenblatt, opposed.

McADAM, J. — The plaintiff's affidavit, after stating the amount of his demand over and above all counter-claims, proves that the defendants, who were partners on the 25th day of September, 1882, were both jointly and individually insolvent, and that being so insolvent and indebted to the plaintiff and others, on joint demands, the defendant Roany made a fraudulent transfer of his interest in the firm to his copartner and codefendant Hutchison. The defendant Hutchison moves on the original papers to vacate the attachment, and thereby admits for the purposes of this motion that the charges made are true. The sole question, therefore, is whether the sale conceded to be fraudulent justifies the attachment.

On first impression it would seem that a transfer from the one joint debtor to the other could not prejudice the plaintiff in collecting his debt; but this impression is removed by considering the legal effect of such a transfer, which makes

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the one partner the sole owner of the firm's property, and gives his individual creditors a preference over the joint creditors of the firm in the marshaling of the assets (*Story's Eq. Jur.*, secs. 646, 675; 2 *Spence's Eq. Jur.*, 213; and see 4 *Barb.*, 571; 41 *id.*, 307; 52 *N. Y.*, 146).

The defendant also claims that as the action is brought to recover a balance due "for goods sold and delivered," it is not such an action as is contemplated by section 635 of the Code, which permits an attachment "where the action is to recover a sum of money only, as damages for * * * breach of contract."

But this position is untenable. The action is for goods sold and delivered. It is founded on contract. The agreed price or the reasonable value being the measure of damages, and the breach consists in the defendant's failure to perform their part of it, to wit, by paying the price or value. The words employed in the present Code are even more comprehensive than those employed by section 227 of the old Code. When the codifiers superseded this section (227) by the new section (635) they did not intend to limit or restrict, but rather to enlarge the right of attachment, so as to have it comprehend not only attachments in actions "arising on contract for the recovery of money only," but every action "for the recovery of damages for breach of (any) contract." This is the more reasonable construction of the legislative intent.

The additional affidavit offered by the plaintiff on the argument has not been considered, because I regard section 683 of the Code of Civil Procedure as merely declaratory of the (then) existing rule of practice in regard to new papers, as reaffirmed by the court of appeals in *Yates agt. North* (44 *N. Y.*, 271), and hold that the case of *Ives agt. Holden* (14 *Hun*, 402) must be limited in its application to the practice as declared in *Yates agt. North* (*supra*).

Motion to vacate attachment denied, with ten dollars costs, and with leave to renew on affidavits.

Waterman agt. Ball.

CHARLES WATERMAN agt. EMMETT J. BALL, as executor, and
ESTER J. BALL, as executrix of the last will and testament
of DANIEL BALL, deceased.

Appeal from a decree of a surrogate's court — Practice.

Where the notice of appeal from a decision of the surrogate's court to the general term of the supreme court, describing the decree appealed from by its date and title, is perfected, the supreme court acquires jurisdiction of the entire decree, and may reverse the same for errors not mentioned in the petition of appeal (*See 8 R. S. [6th ed.], 896, secs. 28, 30, 30; Code of Civil Procedure, secs. 2574, 2575, 2584, 2586, 2587, 2589.*

Oneida Circuit, February, 1880.

THIS action was brought to recover a sum of money upon a written instrument in the words and figures following, to wit:

"SUPREME COURT.

AMANDA M. BENTLEY, RESPONDENT,
against
CHARLES WATERMAN, APPELLANT.

“Received of Charles Waterman, defendant, by O. S. Williams, his attorney, one hundred and fifty dollars, being the amount awarded to me by the surrogate of Oneida county for costs in the above entitled action; and for value received I hereby agree that if, on the final decision of the appeal in said action, the order of said surrogate, in respect to said amount allowed for costs, shall be reversed or modified, I will repay said sum of \$150, with interest from date, or such part thereof as may be in conformity to the final decision in said action.

"Dated *January* 19, 1870.

"DANIEL BALL."

The nature of the defense appears from the following findings made by the court :

This action having been tried at a circuit court held in

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and for the county of Oneida at the court-house in Rome, on the 27th day of March, 1876, by the court, a trial by jury having been waived by the parties in open court, and after hearing the proofs and allegations of the parties, the following conclusions of fact and of law are found by the court, to wit: As questions of fact the court finds,

First. That on the 19th October, 1865, the plaintiff was appointed administrator upon the estate of Joseph Waterman, deceased, by the surrogate of Oneida county, and immediately after such appointment entered upon the discharge of his duties as administrator and made, or procured to be made, an inventory of the property and estate of the deceased, and filed the same in the office of the surrogate of said county.

Second. That on the 22d January, 1866, Amanda M. Bentley, one of the next of kin of the deceased, applied by petition to the surrogate of said county for a further or amended inventory of the personal estate of the deceased, and that upon such petition a trial, hearing, and evidence was had before said surrogate, and testimony was produced and given in behalf of the petitioner, and the said administrator, and thereupon and on the 21st January, 1867, the said surrogate made an order therein, requiring the administrator to make a further inventory of the personal estate of the deceased, and that such inventory include as personal estate of the deceased :

First, cash on hand at the death of the deceased, \$12.50 ; second, a certain note of \$200 and interest, dated April, 1864 ; third, another note of \$700, dated July 13, 1864 ; fourth, another note of \$200, dated January 20, 1865 ; and said surrogate in said order, ordered and decreed that the costs of said proceedings on the application for said further or corrected inventory be paid by the administrator out of the estate of the deceased, as follows :

To the surrogate for his costs.....	\$40 80
To the petitioner for her disbursements.....	57 50
To the administrator for his disbursements.....	65 00.

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To D. Ball, attorney for petitioner..... \$150 00
To. O. S. Williams, attorney for administrator. ... 150 00

Third. That on February 20, 1867, the said administrator appealed from said order to the general term of the supreme court, which appeal was filed that day in the office of the surrogate, with a bond given on the appeal and approved by the surrogate, and a return to such appeal was thereafter made by said surrogate. That thereafter the said administrator made and filed his petition of appeal from said order of the surrogate with the clerk of Oneida county, as required by the rule of the supreme court, and in said petition of appeal set forth and specified that the order was erroneous in all those parts mentioned in the order as "two, three and four, and which relates to notes therein described," that thereafter the said Amanda Bentley filed her answer to said petition of appeal, alleging that the order and decree in the particulars set forth in the petition of appeal and in all other particulars is correct.

Fourth. That while the appeal was pending in the general term of the supreme court and before argument of the appeal, to wit, January 19, 1870, Daniel Ball, "now deceased," and then the attorney of said Amanda M. Bentley, on the appeal, was paid by said Charles Waterman, administrator as aforesaid, the said sum of \$150 so ordered to be paid to said Ball by said surrogate as aforesaid, and upon the receipt of the same by the said Ball, he made, executed and delivered to the said Charles Waterman the instrument in writing dated January 19, 1870, fully set forth in the complaint in this action.

Fifth. That said appeal was argued at a general term of the supreme court of the fourth department, at the January term of said court, in the year 1871, and afterwards, and on the 6th day of February, 1871, at a general term of the said court, held in Buffalo, a decision upon said appeal was made by said court. That no proofs were given upon the trial of

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this action, showing what order or decision of said general term was made upon the decision of said appeal, except as contained in the answer of the defendant, admitting that the order of the surrogate as to the second, third and fourth parts specified in the petition of appeal as erroneous, was reversed.

Sixth. The plaintiff introduced in evidence certain papers purporting to be a judgment record upon said appeal, and which papers were marked, "filed March 27, 1871," by the clerk of Oneida county, and what purported to be the judgment of the general term on said appeal was annexed to the papers used on the appeal, and a copy of which is set forth in the answer of the defendant following exhibit "C," referred to in said answer. That it nowhere appears in said papers, purporting to be a judgment record, that any rule, order, or decision of the general term was made upon said appeal, nor does it appear in evidence that any rule, order, or decision made by the general term on said appeal, was filed in the clerk's office of the county of Oneida.

Seventh. That this action was commenced December 22, 1874, against Daniel Ball, to recover the sum mentioned in said receipt, and that he died, and after his death the defendants, as executors of said Daniel, were substituted defendants in the place of said Daniel Ball on the 26th October, 1875.

From the facts found I find and decree as matter of law that the plaintiff is not entitled to recover, and that he should be nonsuited and the complaint of plaintiff dismissed and judgment of nonsuit and dismissal of complaint is ordered accordingly.

JAMES NOXON,
Justice Supreme Court.

A. N. Sheldon, for plaintiff.

Charles H. Searle, for defendants.

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Noxon, J. — The plaintiff, to maintain his action in this case, was bound to prove that a final decision had been made upon the appeal from the order of the surrogate, by which the order of the surrogate in respect to the amount allowed for costs to Daniel Ball had been reversed or modified. This was the condition of the receipt upon which payment was predicated. The only evidence offered to show the final decision was a record made up and filed in Oneida county, containing no decision or order of the general term of the supreme court. The record offered purports to give the order, judgment and decree of the general term, but it nowhere appears in the record, or in any evidence offered or produced, or in any admission in the pleadings, or elsewhere, that the general term reversed or modified the order of the surrogate's court in respect to the amount allowed for costs. The authority to enter judgment can only appear from a certified copy of the order of the general term directed upon the decision of the court, to be entered by the clerk of the court. This copy order should be obtained and annexed to the roll; it is the authority and only authority which authorizes the clerk to enter judgment. This order is not shown, nor is there any evidence that it was ever filed in the county clerk's office. On the contrary, the clerk certifies that he has made diligent search in the records of his office, and finds no order authorizing an entry of judgment in the action appealed from, and no record that said order was entered in his office in the said action during the period from January 1 to December 31, 1871. There can be no doubt that the decision of the general term upon the affirmance or reversal of order of the surrogate brought into that court upon appeal, should be entered in the office of the clerk of the county in which the surrogate is officer. The appeal brings into the supreme court the pleadings, proofs and proceedings had before the surrogate, and the decision of the court results in a judgment of that court entered with the clerk of the county, and thereafter a certified copy of the judgment is delivered to the surrogate, and said judgment

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controls the surrogate in the further disposition of the proceedings had therein by him. If an appeal is taken to the court of appeals, such appeal is from the judgment entered in the county clerk's office.

After the appeal in this case was brought, and the proceedings transferred to the supreme court, the appellant, in pursuance of the rule of the supreme court, made, filed and served his petition of appeal, in which he specified the parts of the order of the surrogate which he complains is erroneous, and those parts are in relation to certain notes described in the order. No complaint is made in said petition of any error by the surrogate in respect to costs. The opinion of justice JOHNSON, given upon the decision of the appeal at general term, does not consider any question in the decision of the matter before the court, except so far as it relates to the question whether said notes should be included in the inventory, or whether the amount of the notes should be included in the inventory as assets upon a claim of the deceased or his heirs against his widow, or the parties who had paid the notes to the widow. The decision ends as follows: "On the whole testimony before the surrogate, we can have no doubt that a valid gift *causa mortis* was fully proved; and that upon that ground alone the order of the surrogate should be reversed. Order reversed, with costs of appeal to be paid by the respondent personally."

In the absence of any order or direction of the court other or different than what is contained in their opinion, I am of the opinion that no part of the order was reversed or intended to be reversed, except so much of the order as the appellant in his petition of appeal claimed to be erroneous, and that the question relating to costs was not considered by the court; and I am the more inclined to this opinion from the fact that said order contained a provision that the administrator include in his inventory an item of twelve dollars and fifty cents, against which no error was assigned, and the justice in his opinion said, after reviewing the case upon the question as to

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whether the notes should be included in the inventory, "In this he (the surrogate) was most clearly mistaken, in view of all the facts before him, and his order in that respect should be reversed." If, however, as the court may have done, this question was considered and the order directed to be entered by them covering other questions not specifically claimed as error in the order, I have concluded to nonsuit the plaintiff, and leave him in a situation to make such other or further proof in another action as he may deem best.

The plaintiff appealed to the general term from a judgment entered pursuant to the foregoing opinion of justice Noxon, and such judgment was reversed by the general term. No opinion.

Thereupon the defendants moved, at a special term, to correct the judgment-roll in said case of Bentley against Waterman, and the motion was denied, and the defendants appealed from the order denying this motion to the general term and to the court of appeals. This order having been affirmed, this action was again tried before Mr. justice MERWIN without a jury, at the February circuit, in Oneida county, 1880. In deciding the case, justice MERWIN delivered the following opinion :

MERWIN, J.— On the 19th October, 1865, Charles Waterman was appointed administrator of the estate of Joseph Waterman, deceased. In January, 1866, Amanda M. Bentley, one of the next of kin of the deceased, petitioned the surrogate for an order compelling a further inventory; and on this application a trial was had before the surrogate, Mr. Ball, the defendant's testator, appearing as counsel for the petitioner, and Mr. Williams as counsel for the administrator.

On the 21st day of January, 1867, a decree was made by the surrogate requiring a further inventory, which should contain cash, twelve dollars and fifty cents, and three certain notes, amounting in the aggregate to \$1,100, besides interest.

At the close of the decree was the following clause: "And

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it is further ordered and decreed that the costs of these proceedings be paid by the administrator out of the estate of the said Joseph Waterman, deceased, as follows:

To the surrogate, for his costs and disbursements, the sum of	\$40 30
To the petitioner, for her disbursements.....	57 50
To the administrator, for his disbursements	65 00
To D. Ball, attorney for the petitioner, an allowance of	150 00
To O. S. Williams, attorney for the administrator, an allowance of.....	150 00

On the 20th February, 1867, the administrator appealed to the supreme court. The notice of appeal is general, specifying no particular part, but appealing generally from the decree, describing it by its date and title.

On the 4th March, 1867, the appellant served his petition of appeal under the rule, specifying as erroneous that part of the decree relating to the three notes, and saying nothing about the sums awarded for costs. It prayed that Amanda M. Bentley answer the petition; that the decree be reversed or modified and rectified, and for such other relief as might be just. This petition was signed by Mr. Waterman and by Mr. Williams as attorney. An answer was put in by Mrs. Bentley, which was signed by her and by Mr. Ball as attorney.

Thereafter, and while this appeal was pending, and on the 19th January, 1870, Mr. Ball received from Mr. Waterman, the plaintiff in this action, the \$150 awarded to him for costs in the decree, and gave back to Waterman an agreement in writing, agreeing for value received "that if, on the final decision of the appeal in said action, the order of said surrogate in respect to said amount allowed for costs shall be reversed or modified, I will repay said sum of \$150, with interest from date, or such part thereof as may be in conformity to the final decision in said action."

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In February, 1871, the general term made an order reversing generally the order of the surrogate, and on the 27th March, 1871, judgment was entered reversing in all things the decree of the surrogate.

The present action is brought on the agreement of January 19, 1870, against the executors of Mr. Ball, to recover the \$150.

The main question is whether the general term had jurisdiction to reverse the decree *in toto*, thereby reversing it as to the costs allowed Ball, although in the petition of appeal no error as to the allowance of costs was specified.

Upon the former trial of this action it was held, among other things, that the order of the general term was operative only on the parts specified in the petition of appeal, and judgment of nonsuit was granted which, on appeal, was reversed. The ground of reversal does not appear. If the court had held with the defendant that the order of the general term of February, 1871, was not operative on the items of costs allowed by the surrogate, there would seem to have been no reason for reversing the judgment.

In June, 1878, a motion was made to the general term to modify the order of February, 1871, so as to limit it to the parts of the decree specified in the petition of appeal. This motion was denied, and an appeal to the court of appeals from such denial was dismissed (9 *N. Y. Weekly Digest*, 205), it being said by that court that the order appealed from was a discretionary one, assuming the application to have been made in time. Would this have been so, had the general term no jurisdiction to make the original order (59 *N. Y.*, 629) ?

It seems to me that the jurisdiction of the general term, and the extent of its authority in the matter, were fixed by the notice of appeal, the same being perfected in conformity with the statute by filing the notice and the required bond with the surrogate (3 *R. S.* [6th ed.], 896, *secs.* 23, 29, 30).

The filing of these papers constituted sufficient notice to

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the adverse party (*Sec. 38, page 897*). All proceedings on the order appealed from were staid. If some party in interest is not made a party to the petition of appeal, he can apply to the supreme court to be admitted, and must give notice of this application to the opposite party (*Suffern agt. Lawrence, 4 How. Pr. R., 129*).

No proceeding can be had on the decree of the surrogate without leave of the appellate court (*Halsey agt. Van Amring, 4 Paige, 279*).

In the present case the notice of appeal was general and covered the entire decree. The appeal was such that under the former practice would have been taken to the court of chancery. The entire case was transferred (*Clayton agt. Wardell, 2 Bradf., 6; Schenck agt. Dart, 22 N. Y., 420; 9 Abb., 393; Dayton, 741*).

It may be, as is said in *Brown agt. Evans* (34 Barb., 594), that the rights of parties, not made parties to the petition of appeal, should not be disturbed. But that is not the point here. The question here is whether the appellate court had jurisdiction to make the order reversing the entire decree. In my opinion it had.

It would seem from the instrument sued on, that defendants' testator supposed that the appellate court had the power to reverse as to costs. That contingency was contemplated by the parties, and this was long after the petition of appeal had been served and answered.

The costs allowed by the surrogate were the costs of that particular proceeding.

The amount in question was allowed for the benefit of the original petitioner, and she was the party in interest. If the costs were incident to her claim, and her claim was objected to and fell, the costs would fall with it. The surrogate had no right to allow costs in that form (*Reed agt. Reed, 52 N. Y., 651*).

A question was raised on the trial as to the regularity of the judgment record offered in evidence by the plaintiff. I

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do not see how that question can be raised here. The record purports to be the judgment of the general term signed by the clerk of the court in and for this county and filed here. If there is anything about it irregular, that is a proper subject for a motion in that case. The question cannot be raised here (48 *Barb.*, 73). It follows that the plaintiff is entitled to judgment.

ERIE COUNTY COURT.

OLIVER H. P. CHAMPLIN agt. THOMAS STODART, impleaded, &c.

Proceedings supplementary to execution are special proceedings — Commission to take testimony of a foreign witness in these proceedings cannot be issued — Code of Civil Procedure, sections 888-2433.

The power of this court to award a commission, without the consent of parties, to take the testimony of a witness out of this state, depends entirely on statute, and can only be exercised in the cases therein specified.

The provisions of the Code of Civil Procedure, in reference to taking depositions out of this state (*secs. 887 et seq.*), relate to actions only.

Supplementary proceedings are special proceedings, and a commission cannot be issued to take the testimony of a foreign witness in such proceedings.

MOTION for an order directing a commission to issue to examine witnesses out of the state in proceedings supplementary to execution.

James A. Allen, for motion.

U. S. Johnson, opposed.

HAMMOND, Co. J.— From the papers and facts presented in this case, I am very decidedly of the opinion that this motion is made in the utmost good faith, and the plaintiff should be allowed the order he asks for, and the privilege of taking the testimony of these witnesses, if the rules and practice of the court or the enactments of the legislature warrant it.

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So far as I have been able to find the proposition is a new one, not having been decided in any reported case, whether a commission may issue to take the testimony of a foreign witness in these proceedings.

Prior to the enactment of the Code of Civil Procedure, it was generally held that supplementary proceedings were proceedings in the action, and were to be treated as such, and governed by the rules and practice governing proceedings in the action, but the question was not free from doubt, as it had been expressly held they were not proceedings in the action but were special proceedings.

But the Code of Civil Procedure has set the matter at rest beyond any controversy by section 2433, in which it expressly provides that they are special proceedings.

The attorney for the plaintiff insists that under the provisions of subdivision 2 of section 888 of the Code of Civil Procedure, he is entitled to the order asked for, and that the commission should issue, because it is a case when "the testimony is required to carry the judgment into effect."

This squarely raises the question whether this provision is applicable to supplementary proceedings.

In the Matter of an Attorney (83 N. Y., 164), judge DANFORTH, in giving the opinion, says: "Chapter 9, title 3, article 2 (sections 887 to 913), relates to actions only in their various stages, and neither by its terms nor any implication can it be extended to any other mode or form of proceeding."

Further on he states, what I think must be conceded to be true, that the power to award a commission to take the testimony of a foreign witness depends entirely on the statute; and that independent of some provision of statute authorizing it, no commission can issue to take the testimony of a foreign witness; and I think, aside from the provision of subdivision 2 of section 888 of the Code above quoted, no provision of statute can be found which will be claimed to authorize the issuing of the commission asked for upon this motion.

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So that in view of the decision of the court of appeals, that this section of the Code quoted and relied upon by the plaintiff "*relates to actions only*," and that the legislature have by section 2433 expressly declared that supplementary proceedings are *special proceedings*, I am forced to the conclusion that there is no provision of statute which authorizes the granting of the order directing the commission to issue in these proceedings, and the motion must be denied.

N. Y. COMMON PLEAS.

GEORGE W. ALLEN, trustee, agt. STEPHEN D. AFFLECK.

Agreement of separation between husband and wife — When of no effect — Agreement between them and a trustee selected by them providing for a separation for life is valid — Although an agreement be void, party benefited by part performance must pay for what he has received — Provision as to custody of children, how to be tested.

Where a case is submitted on the pleadings, everything stated in the complaint or set up in the answer to it, may be taken as facts agreed upon between the parties.

An agreement of separation between husband and wife is of no effect, unless the parties are separated when the agreement is entered into, or they separate afterwards in pursuance of the agreement.

An agreement between husband and wife and a trustee selected by them, providing for a separation of the husband and wife during life is valid both at law and in equity, and a provision awarding the custody of the children, either to the husband or wife is not necessarily void.

The question how far these agreements are valid discussed.

Although an agreement be void, yet if a party has derived a benefit from it by a part performance, he must pay for what he has received, and the stipulated amount which the trustee was to receive and the husband was to pay may be taken as the measure of damages.

If a provision as to the custody of children be voidable, the husband may test the question by *habeas corpus* or by demanding the custody of the children upon that ground, and then refusing to pay for further maintenance.

General Term, May, 1882.

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APPEAL from an order of the general term of the marine court, reversing a judgment entered upon a trial of the action had before Mr. justice McADAM, at special term, without a jury. The facts sufficiently appear in the opinion of the court.

H. T. & J. W. Cleveland, for plaintiff and appellant.

A. Simis, Jr., for defendant and respondent.

DALY, C. J. — This case was submitted on the pleadings, and where this is done everything stated in the complaint, or set up in answer to it, may be taken as facts agreed upon between the parties. An agreement of separation between husband and wife is of no effect, unless the parties are separated when the agreement is entered into, or they separate afterwards, in pursuance of the agreement (*Carson agt. Murray*, 3 Paige, 483; *Morse agt. Craig*, 5 Bu. & Pul., —).

It is not directly averred in the complaint that a separation had taken place, in pursuance of the agreement, but it is inferable from what appears when the whole of the pleading is taken together. It is averred in the complaint that the defendant agreed to pay to the trustee twelve dollars a week for the support and maintenance of the defendant's wife and two children; that the plaintiff agreed that the defendant should not be put to any charge or expense for the support and maintenance of the wife and children beyond this twelve dollars a week; and it appears by the agreement annexed to the complaint that the wife was to take the twelve dollars a week for the support and maintenance of herself and the two children; that the trustee agreed that she would fulfill that engagement, and that he would hold the husband harmless from any expense but the payment of the twelve dollars a week, that he would indemnify and save him harmless from all debts that the wife might thereafter contract, either on her own account or on account of the children. And if the husband was compelled to pay any such debts that he (the

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trustee) would repay the sum to him with all damage or loss he might sustain thereby.

It is averred that the trustee fully performed all the conditions on his part, which is equivalent to a statement that the defendant was put to a charge or expense for the support of the wife and children beyond the twelve dollars a week, so far as it may have been paid, which was presumably up to January, 1880. It appears by the answer that the defendant offered, in January, 1880, to support his wife and children if they would reside with him, and that the wife refused his offer, and still refuses to live and cohabit with him; which shows that they were living separate and apart when this offer was made, and continued so to live apart up to the time of the commencement of the action.

The claim was for thirty-six weeks at twelve dollars a week, which is about the time that elapsed from the period when this offer was made and the commencement of the suit. The recovery was \$432, with interest, from the thirtieth day of September, which would be thirty-six weeks, or from about the middle of January to the 30th of September, 1880. It, therefore, appears that before the commencement of the period for which this claim of \$432 was made the husband and wife were then living separate from each other and continued to do so until the suit was brought, which was all that was requisite in this action to show that a separation had taken place in pursuance of the agreement.

It is well settled that an agreement like this, between the husband and the wife and trustee, for a separation during life is valid and effectual, both at law and in equity (*Calkus agt. Levy*, 22 Barb., 106, 107; *Carson agt. Murray*, 3 Paige, 483; *Selling agt. Crowley*, 2 Vern., 386); and, as respects the wife, it would not be invalidated, although the provision in the agreement in respect to the children might be void (*Louth agt. Palmer*, 3 N. Y., 19-37; *Parsons on Contracts*, 458). Nor, if we assume, upon the authorities cited by the appellant, that the provision respecting the children was one

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that the court would not enforce, being void as against public policy, does it necessarily follow that the defendant is not answerable to the trustee for the support of the wife and children so far as the agreement has in good faith been executed. In *Van Sittart agt. Van Sittart* (2 *De Gex & J.*, 255), where such a stipulation in respect to the support of the children in an agreement for a separation was held to be void as against public policy, distinction was made between enforcing the specific performance of an agreement for a separation containing such a provision and questions that may arise where such agreements have been executed in a whole or in part. It was said in that case that the father has not only a right to his children but duties to discharge towards them, and that he should not be allowed to fetter and abandon his parental power to the extent that he might do if agreements of this character were sustained.

But where, under such an agreement, the husband has voluntarily left the care and custody of the children to the wife, and they have been supported by the wife and the trustee, under a stipulation that he would pay twelve dollars a week to the trustee for the support of them and the wife, there is no reason, legal or equitable, why, in such a case, the trustee should not recover from him that amount, as money expended with his consent and for his benefit.

An agreement may be void, but if a party has derived benefit under it by a part performance, he must pay for what he has received, and the stipulated amount which the trustee was to receive and the husband was to pay may be taken as the measure of damages (*King agt. Brown*, 2 *Hill.*, 485; *Lockwood agt. Barnes*, 3 *id.*, 128; *Nones agt. Otis*, 2 *Hilton*, 116; *Broadwell agt. Getman*, 2 *Denio*, 991; *Mavern agt. Pine*, 2 *Car. & P.*, 91; 3 *Bing.*, 285).

If this provision in the agreement was void, and the defendant had afterward demanded the custody of the children of the wife and the trustee, and they had refused to give them up, he could have had them restored to his custody by a writ

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of *habeas corpus*, or if he did not resort to that writ, it may be that he would not thereafter be liable to pay the trustee the twelve dollars a week, as they would then be supported by the wife and the trustee against his consent. All, however, that appears by the pleadings is that he offered to support the wife and children if they would reside with him; and that the wife refused. The wife was under no obligation to do so, as the agreement, so far as it related to her right to live separate and apart, was a valid one. It was not an offer to take the children without her, and in no sense can it be regarded as a demand of them alone from her and the trustee. If he wanted the children without her, it was an easy matter simply to so demand them; and if the demand was refused, to have them delivered up to him by the summary remedy of a writ of *habeas corpus*.

It amounted simply to this — as the wife would not come with the children and live with him, he allowed them to remain with her, and to be supported as they were thereafter by her and the trustee. This view of the case is taken upon the assumption that the provision in respect to the children is invalid, but it is by no means a settled question that agreements of that nature are absolutely void. In Massachusetts, Maine and New Hampshire, it would seem, from the adjudged cases, that they are not (*Woodell agt. Coggeshall*, 2 Met., 89; *State agt. Smith*, 6 Maine, 402; *State agt. Barrett*, 45 N. H., 15).

Judge COWEN and chancellor WALWORTH, in *The People agt. Mercine* (3 Hill, 410; 8 Paige, 67, 68), were of the opinion that such agreements are void, but the point has never been expressly adjudged in this State, for it was not essential to the ultimate decision of the court in that case, as the agreement for a separation there was not for a separation during life, but for a temporary period; a kind of agreement which, it has been held, is not binding, and which either party is at liberty at any time to put an end to (*Calkins agt. Long*, 22 Barb., 106), and which Barry, the father in that case, did by demanding and recovering the custody of his child.

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It is not, in my opinion, necessary to decide whether the agreement in this case was invalid or not. I take occasion, however, to say that I do not see upon what ground it should be deemed void as being against public policy. This instrument declares that divers disputes, unhappy differences and divisions had arisen between the husband and wife, for which reason they consented to live separate and apart during their lives. That the furniture in the house 79 High street, in Brooklyn, was set apart for the use of the wife and children, but was to remain the property of the husband, and was not to be disposed of by the wife. That the husband should pay the trustee twelve dollars a week for the support of the wife and children, which was fixed upon after taking into consideration the value of certain real property which had been conveyed by the husband to the wife. That she was to have the custody and control of the two children and of their education, which was given to her at her request and against the wish and desire of the husband. That one of the children, the son, should spend his Saturdays with the father, and in addition spend every fourth Saturday at the father's place of business or residence, wherever that might be. And that the other child, the daughter, was to be allowed the privilege of visiting and seeing the father whenever he might wish or desire her to do so, and also that the daughter might visit him from time to time as she might desire; and that in case either of the children should be so ill as to be confined to the house, that the husband should be informed of the fact and have the right and privilege of visiting them or either of them, during such sickness, and that at all other reasonable times that he might visit them.

I see nothing in this agreement that is against public policy. So far from indicating any intention on the part of the husband to abandon his parental duties, its provisions are carefully drawn to secure, so far as was compatible under the unhappy circumstances of a separation like this, that intercourse between parent and child which is essential to the

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paternal influence; and, also, the exercise on his part of that care and watchfulness, in the event of sickness, which grows out of the paternal anxiety, and is the duty of a parent. The care, custody and education of the children are left to the wife, but it may well have been that that was the best arrangement to make; and, being so, was assented to by him reluctantly and against his wishes.

I fully agree that it is against public policy to uphold agreements by parents, the design or effect of which is to fetter or abandon the parental duties. But it is now well settled that parties may lawfully enter into agreements for separation during life. Judge COWAN, in *The People agt. Merien (supra)* calls them "a kind of divorce which the courts cannot very well, at this day, gainsay." This being so, it follows as incidental to such a separation, that some disposition must be made of the children, if they have any. They cannot be brought up under the mutual superintendence of father and mother as before, and must be left in the custody of one of the separating parties. The law generally leaves the custody of children with the father, but where the custody of them comes in question, as it usually does, upon writs of *habeas corpus*, it may be denied, both to the father and the mother, and given to other relatives or to strangers, the rule being that that disposition is to be made which is best for the child (*Kent's Com.*, 205; *Schouler's Domestic Relations*, 338). Upon such a separation, the father may be of the opinion that it is best for the interest of the children that the care of them should be left to the mother, and it by no means follows that because it is so provided in the agreement, that he has abandoned his parental duty.

It appears to me that the parties have, upon their separation, arranged the delicate matter of the care and bringing up of the children as well as the law could do it for them; and where there is nothing more objectionable than appears in the provisions in this agreement, that the custody and bringing up of the children had better be left as the parties have

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arranged it, unless we go back and hold, as lord ELDON puts it in *St. John agt. St. John* (10 Vesey, 530), "that the rule upon the policy of the law is that the contract shall be indissoluble, even by the sentence of the law, that people should understand that, after entering in the sacred contract of marriage, they should feel it to be their mutual interest to improve their tempers." It might be very well if the law could compel this, but it cannot, the temper being in many cases an infirmity of nature which is beyond the power of the party to control. If a husband and wife cannot live together except by a life that is intolerable to both, the law should not be used as an instrument to coerce them to do so, a conviction that has slowly gained ground and gradually led to a recognition of the validity of agreements of this nature for a separation.

I do not propose to pursue this question, which would involve a somewhat critical examination of the cases in which it has been considered, further than to remark, in respect to the two principal ones, that in *The People agt. Merien* (*supra*), the agreement of Barry, the husband, was that he would relinquish to his wife all his right, accruing at the time of the agreement and at any future period, to their daughter, provided the wife would require him to do so. And in *Van Sittart agt. Van Sittart* (*supra*), it was provided in the agreement that neither of the two elder sons should be sent to any school without the written consent of both husband and wife (*per* KNIGHT BRUCE, *J.*, *p.* 59), in both of which there was more ground for assuming an abandonment of the paternal duty than there is in this case. This contract was executed, both as respects the wife and the children, up to the period for which the twelve dollars a week was recovered by the trustee. Judge McADAM was therefore right in giving judgment for that amount, and in my opinion the judgment of the general term should be reversed, and that of the special term affirmed.

Mackenzie agt. Alster.

SUPREME COURT.

DINNAN E. MACKENZIE agt. ADAM ALSTER.

Specific performance — Foreclosure of mortgage by advertisement — Necessity of service of notice of sale upon mortgagor or his personal representatives.

In an action for specific performance of a contract of sale of real property, the plaintiff's title to the premises being through a foreclosure of a mortgage by advertisement; the mortgagor was not served with the notice, but died pending the proceedings, leaving a widow and one child. The widow was served with the notice. No administrators of decedent's estate was appointed.

Held, that the title tendered by the plaintiff is not such as a court of equity ought to compel the defendant to accept.

The death of the mortgagor and the non-appointment of an administrator does not render the service of a notice of sale unnecessary. The court has no power to dispense with a positive provision of a statute.

Special Term, December, 1882.

THIS action was brought for a specific performance of a contract of sale of real property.

Plaintiff's title to the premises was through a foreclosure of a mortgage therein, by advertisement.

The mortgagor was not served with the notice, but died pending the proceedings, leaving a widow and one child. The widow was served with the notice. No administrator of decedent's estate was appointed. The defendant rejected the title because neither the mortgagor or the personal representatives were served with the notice.

Barney & Conman, for plaintiff.

John H. Clayton, for defendant.

GILBERT, J. — The question to be decided is whether the title tendered by the plaintiff is such as a court of equity ought to compel the defendant to accept. That title is derived from the foreclosure of a mortgage made by one

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Fitzpatrick, by virtue of the statute regulating the proceedings to foreclose mortgages by advertisement (*R. S.*, 545). Fitzpatrick died while these proceedings were pending, intestate, and no administrator of his estate has been appointed, no notice of the foreclosure of the mortgage by a sale of the mortgaged premises was served upon Fitzpatrick. These principles are well settled.

First. That the mortgage, together with the power of sale contained in it, constitute a security merely. The mortgagor continued to be the owner of the estate mortgaged (*Thos. on Mortgages*, 15; *R. S.*, 738, *sec.* 133).

Second. That the power of sale could be executed only by a strict compliance with all the provisions of the statute cited (*Lawrence agt. Farmers' Loan and Trust Co.*, 13 *N. Y.*, 200, 211; *Mowry agt. Sanborn*, 68 *N. Y.*, 153, 161; *Arnot agt. McClure*, 4 *Den.*, 41; *Cohoes Co. agt. Gaf.*, 13 *Barb.*, 137; *Lyman agt. Whitney*, 20 *id.*, 559; *Bryan agt. Butts*, 27 *id.*, 503).

Third. That the requirements of the statute are conditions precedent to a valid sale under the power and have the same effect as if they had been inserted in the mortgage (68 *N. Y.*, 153).

Fourth. That when the vesting of an estate depends upon the performance of conditions precedent it cannot vest unless the conditions are performed.

The condition precedent omitted in this case was the service of the notice of sale upon "the mortgagor or his personal representatives." The mortgagor left a widow and one child only one year old. No administrator of his estate having been appointed, it is insisted that the provision of the statute respecting notice to the mortgagor or his personal representative became inoperative. It was so held in *Anderson agt. Austin* (34 *Barb.*, 319). No reasons were assigned for that doctrine, and it seems to me to be utterly irreconcilable with the authorities cited and with general principles of universal application. If for any cause a party cannot avail himself of

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a legal remedy provided by statute, he must either forego the remedy or remove his disability. Statutes cannot be abrogated because parties are unable to comply with the provisions of them. In this case, however, there existed no insuperable difficulty in complying with the statute. It was conceded on the argument by both parties that executors and administrators, not heirs or devisees, are the personal representatives of a mortgagor within the meaning of the statute referred to. The provisions of the statute (1 R. S., 749, sec. 4), imposing upon an heir or devisee the duty of paying a mortgage upon land which has descended or passed to him would seem to render such heir or devisee a fitter representative of a deceased mortgagor, with respect to proceedings to foreclose the mortgage, than are executor and administrator. But taking the concession as correct, all that is necessary for a mortgagor to do is to take the requisite steps to have an administrator appointed or wait until some one who has a prior right to letters of administration shall have done so, or to set in motion the public administrator resort to a court of equity for the foreclosure of his mortgage merely. The court has no power to dispense with a positive provision of a statute. If it can with one it may with all. If the death of the mortgagor and the non-appointment of an administrator renders the service of a notice of sale unnecessary, the non-existence of a newspaper in the county would render unnecessary the publication of an advertisement of sale. Thus the provisions of the statute might be frittered away. I do not believe that the power to produce such results exists.

The complaint must therefore be dismissed, with costs, unless the defendant consents to have the case stand over for the purpose of making a good title.

Feig et al. agt. Wray.

SUPREME COURT.

ISAAC FEIG *et al.* agt. THOMAS WRAY.

Costs — against administrators — When personally liable for — Code of Civil Procedure, section 3246.

Executors and administrators suing in their representative characters, *unnecessarily* in cases where the cause of action (if any) accrues to them in their individual right, and failing to recover, are personally liable to the defendant for costs.

Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action rests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form in his representative capacity, *unnecessarily*, if he fails to obtain judgment.

In such case the defendant may enter judgment against the plaintiff for costs without an order of the court permitting him to do so.

Special Term, January, 1883.

LAWRENCE, J. — This action was brought by the plaintiff as administrator of the goods and credits of William Brusle, deceased, to recover the value of certain goods which were alleged in the complaint to have belonged to the deceased. The complaint avers that the intestate died on the 4th of September, 1879, and that on the 24th of September, 1879, the plaintiff was appointed the administrator of the estate, and that he duly qualified and entered upon the discharge of his duties as such administrator. It is then alleged that the intestate was the owner at the time of his death of the goods, to recover the value of which this action is brought, and that subsequent to his death, and prior to the appointment of the plaintiff as administrator, the defendant unlawfully took possession of the same, and converted them to his own use. It is also alleged that prior to the commencement of this action after his appointment, the plaintiff, as such administrator, demanded the possession of such goods, &c., from the defendant, who refused to deliver up the same. The cause was

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referred to Mr. Abbott, as referee, who found in favor of the defendant, and that he was entitled to judgment, with costs. Subsequently judgment was entered dismissing the complaint with costs. The *postea* is entitled *Isaac Feig agt. Thomas Wray*, there being no description of the plaintiff as an administrator in the title. This motion is made to amend the *postea* "by adding to the name of the plaintiff, in the title thereof, the words as administrator of the goods, chattels and credits of William T. Brusle, deceased," the object being of course to exempt the plaintiff from the payment of costs individually. The plaintiff's counsel relies upon section 3246 of the Code of Civil Procedure in support of his motion, and of the proposition that it not having been found by the referee that his client has been guilty of bad faith in the prosecution of the action, costs under that section cannot be imposed upon him personally. To this it is replied, on the part of the defendant, that section 3246 of the Code of Civil Procedure is the same as section 317 of the old Code, and that under the old Code it was frequently held that in a case of this nature the unsuccessful plaintiff, executor or administrator was liable for costs personally, and that, too, without an express order of the court to that effect. It will be observed by a reference to the complaint that the alleged wrongful taking of the goods occurred after the death of Brusle, and that the conversion became complete when on a subsequent demand by the plaintiff as administrator the defendant refused to deliver possession of the goods. In *Holdridge agt. Scott* (1 *Lansing R.*, 303) it was held that where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action rests in the executor or administrator in his private right, and that he cannot in such case escape the penalty of costs, by suing in form in his representative capacity, unnecessarily, if he fails to obtain judgment. That case arose under section 317 of the Code of Procedure, and justice LAMONT, in delivering the opinion of the court, which was concurred in by justices DANIELS and MARVIN, reviews

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all the cases, and reaches the result above stated. To the same effect is the case of *Fox* agt. *Fox* (5 Hun, 53, 54) decided by the general term of the fourth department, opinion per GILBERT, J. The doubt which I entertained on the argument of this motion was chiefly as to the right of the defendant to enter judgment against the plaintiff in this case without an order of the court permitting him to do so. An examination of the authorities conclusively shows that he has such right (See *Bostwick* agt. *Brown*, 15 Hun, 308; *Holdridge* agt. *Scott*, 1 Lansing, 303; *Lyon* agt. *Marshall*, 11 Barb., 242, and cases cited, per EDWARDS, J., at p. 248; *Smith* agt. *Petten*, 9 Abb. [N. S.], 205). This motion will therefore be denied, with costs.

RENSSELAER COUNTY COURT.

In the Matter of STEWART CHURCH, a supposed lunatic.

Practice — In proceedings *de lunatico inquirendo* — Right of counsel to sum up to the jury — Refusal of such right, error — Code of Civil Procedure, sections 2323, 2325, 2327, 2328.

In proceedings instituted for the purpose of inquiring as to the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind, to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate. A commission thereupon issues to one or more commissioners, who cause a jury to be summoned, before whom the investigation is had. This was the course pursued in this case, and on the hearing before the jury various objections were taken to the admission of evidence, and at the close of the proof counsel for the alleged lunatic insisted upon the right to address the jury on his behalf, which was refused by the commissioner. On motion to confirm; *Held*, that the refusal of the commissioner to allow the counsel for the alleged lunatic the right to address the jury upon the evidence is error and fatal to the motion to confirm the findings of the jury.

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ON the petition of one of the relatives of Stewart Church, accompanied by affidavits, in compliance with section 2325 of the Code of Civil Procedure, an order was granted by this court, directing that a commission issue to a person therein named for the purpose of causing inquiry to be made, pursuant to sections 2328, &c., concerning, among other things, the alleged lunacy of said Church.

A jury was accordingly duly summoned, impaneled and sworn and the inquiry proceeded with before them. Both the petitioner and the alleged lunatic appeared by counsel, and witnesses were produced and examined on behalf of each. At the close of the evidence, counsel for the alleged lunatic asked leave to address the jury on his behalf, claiming and insisting on his right to do so. This was refused by the commissioner. The jury found against Church. The petitioner now moves for an order confirming the findings of the jury and the appointment of a committee. The motion is opposed on behalf of Church for alleged errors and irregularities in the proceedings, and on the further ground that the finding of lunacy is not justified by the evidence.

Orrin Gamble, for petitioner.

Henry A. King, for Church.

FURSMAN, J.—Proceedings instituted for the purpose of inquiring as to the sanity of a citizen, and which may and often do result in depriving him of the control of his property, and even of his liberty, are of such grave importance as to require the careful scrutiny of the court, to ascertain whether any errors have been committed which may have worked injustice to the supposed lunatic. The practice is to present to the court a verified petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind, to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the

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appointment of a committee of his person and estate. A commission thereupon issues to one or more commissioners, who cause a jury to be summoned before whom the investigation is had. This was the course pursued in this case. On the hearing before the jury various objections were taken to the admission of evidence; and at the close of the proof, counsel for the alleged lunatic insisted upon the right to address the jury on his behalf. This was refused by the commissioner, and an exception was taken to such refusal. This was error. The right of the petitioner, and of the alleged lunatic to appear by counsel, to challenge jurors, and to produce, examine and cross-examine witnesses, is unquestioned. Objections to the competency and materiality of evidence may be raised and insisted upon, and the rulings of the commissioner admitting or excluding evidence may be reviewed on the motion to confirm. And the court may, for errors in this respect, set aside the commission or order a new trial. The hearing before the jury is conducted in all respects as a trial. Questions both of law and of fact are there considered and passed upon. There is a well defined issue between the parties. The petitioner avers lunacy, the alleged lunatic denies it. Witnesses are examined concerning the acts, conversations, demeanor and manner of life of the alleged lunatic during the two years immediately preceding the inquiry. Facts bearing upon these subjects may be given, and witnesses are allowed to express an opinion whether the acts, conversations, &c., testified to by them were rational or irrational, and the opinion of experts may be taken as to the mental condition of the party. The commissioner must charge the jury as to the law, and in his charge may recapitulate the facts, and his charge is subject to review. As I have before said, the question whether a man is or is not insane is of very great importance. It is difficult to conceive of a case, not involving human life, which can be of more importance. Society is as much interested in being protected against the violence of the insane as against the depredations of criminals.

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A person judicially declared to be a lunatic is at once deprived of all control, not only of his property, but of his person as well. While this judgment remains in force he cannot make the simplest contract, nor even dispose of his estate by will. He may be restrained of his liberty, and if, by reason of his supposed harmlessness, this is not done, he is shunned as well as pitied by his neighbors and friends. Being in fact sane, he may, by force of this judgment, be confined in an asylum with the really mad, and his whole life rendered a burden to him. Any person may present a petition charging that another is a lunatic (*Code of Civ. Pro.*, sec. 2323), and if verified, accompanied by proper affidavits and sufficient in substance, it is made the imperative duty of the court to cause his mental condition to be inquired into, either by a commission, as in this case, or by a jury trial at a term of the Court (Sec. 2327). In either case the jury is to pass upon the question of his sanity. Their verdict must be founded upon legal evidence of his conduct, conversations, and demeanor, supplemented, it may be, by the opinions of those who have observed these, and of experts.

There is no other forum where he can be heard to deny, qualify, or explain away the evidence brought against him. It is therefore of the very greatest importance that a right conclusion should be arrived at. He is entitled to have the evidence "sifted to the last syllable." It is conceded that he may appear by counsel, who, in every other respect, may have the full charge and conduct of the case, as in ordinary actions. It is only denied that he may have the benefit of counsel's argument upon the facts to the jury. Everything that is said and done at the hearing is said and done for the purpose of enabling the jury to intelligently and rightly determine whether the supposed lunatic is in fact insane, and should be deprived of the control of his property and person. It is therefore of the greatest consequence that the jury should be able to clearly understand the relation of the facts to each other, to appreciate the force of the evidence and be able to

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give it proper weight and consideration, in order to reach a just decision of the question before them.

It is of the highest importance that the supposed lunatic should have the aid of counsel in sifting, comparing, and arguing upon the evidence. I think this is a legal right which cannot properly be denied him. I think that the alleged lunatic has a right to argue to the jury that the facts proved against him do not establish his insanity, or that his own proof overcomes that of his adversary. I think that he is entitled to point out to the jury discrepancies and contradictions in the evidence; to comment upon the credibility of witnesses; to urge that the weight of evidence is with him, and that, even from the evidence produced against him, an inference may, and justly ought to be drawn in his favor. If he may do this at all he may do it by counsel. In my judgment it is of quite as much importance that he should have the aid of counsel in arguing his case to the jury as in examining and cross-examining witnesses, I know of no principle of law which authorizes the commissioner to refuse to permit the exercise of their right. In ordinary civil and criminal actions the right to sum up to the jury is considered to be of great importance and a refusal to permit it is regarded as error. In *Penhryn Slate Co. agt. Meyer* (8 *Daly*, 61) it was held that the right to open and close the proofs, and to reply in summing up the case to the jury, is a strict legal right, not resting in the discretion of the court, and that to deprive a party of it is error. A similar doctrine was held in *Millard agt. Thorn* (58 *N. Y.*, 402). In *Scott agt. Hull* (8 *Conn.*, 296) judge HOSMER says of the party having the affirmative of the issue: "His was the right of opening and closing the argument." It was, however, held in that case to be a question of practice, and that it was discretionary with the court to allow either party to go first forward with the argument. The rule is otherwise in this state (*Millard agt. Thorn, supra*). In *Davis agt. Mason* (4 *Pick.*, 158) the defendant had been refused the right to begin at the trial. In granting

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a new trial for that reason, chief justice PARKER said: "Considering this right of opening the cause and replying to the arguments of the plaintiff may be important, we feel ourselves obliged to grant a new trial, although from the view of the case which we have from the report we think that the verdict was right." In *Huntington agt. Conkey* (33 Barb., 218) judge E. DARWIN SMITH says: "The privilege of making the opening statement of the case to the jury and of making the closing argument upon the evidence is an advantage not unappreciated or inconsiderately sought and claimed by the counsel for litigating parties in courts of justice. In many cases it is of the highest importance, and particularly so when the facts are complicated and there is contrariety in the evidence, or it is nicely balanced and slight circumstances are likely to turn the scale" (*In the Matter of Dickie*, 7 Abb. N. C., 417). Counsel for the alleged lunatic was permitted to sum up against the objection and exception of the petitioner. The jury having found that the alleged lunatic was of sound mind, on the motion to confirm it was insisted that this was error. The court, BRADY, J., held otherwise and sustained the finding (*In the Matter of Arnhout*, 1 Paige, 498). Chancellor WALWORTH, in setting aside a commission for irregularities and ordering a new one to issue, assumed to give directions to the new commissioners as to the manner of their procedure in executing it. He said: "After the testimony is closed the commissioners should submit the question to the jury in the form of a charge, stating the law applicable to the case and recapitulating the facts if necessary, but without argument of counsel on either side." No authority is cited and no reason is given why counsel should not be allowed to address the jury. The question was not before the chancellor for adjudication, and his remark does not rise to the dignity of a decision. I cannot regard it as an authority and am satisfied that the weight of reasoning is the other way. Barbour's Chancery Practice and Crary's Special Proceedings contain the same statement in the same language

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(citing 1 *Paige, supra*), as the authority therefor. Neither they nor any other text writer whose works I have been able to consult furnish any reason whatever in support of such a rule, and I think the principle established by the cases above cited is in direct conflict with it. It is urged by counsel for the petitioner that it is always discretionary with the trial court to grant or refuse permission to counsel to sum up to the jury, and I am cited to a remark of judge WILLARD, in the case of *The People agt. Cook* (8 N. Y., 87), to the effect that whether counsel shall be permitted to address the jury is a matter resting in the sound discretion of the court. The question was not involved in the case. The trial court had ruled that there was no question of fact arising on the evidence for the jury to pass upon, and directed a verdict. According to the view of the presiding judge, there was nothing about which counsel could argue to the jury, and the court of appeals sustained this ruling. The remark that it is discretionary with the court to permit or refuse permission to counsel to sum up was wholly *obiter*. If it could be considered an authority at all in this respect, it is overruled by *Millard agt. Thorn*, above cited.

Inasmuch as I deem the error of the commissioner, in refusing the counsel for Church the right to address the jury upon the evidence, fatal to the motion to confirm the findings of the jury, I do not deem it necessary to consider the other questions in the case.

The motion to confirm is denied and a new hearing ordered.

Newcomb agt. Hale.

SUPREME COURT.

EDWARD NEWCOMB, receiver, &c., agt. MATTHEW HALE and others.

Costs—Where in an action in which costs are in the discretion of the court, a judgment is rendered in the supreme court, without any provision for costs, and on appeal to the court of appeals such judgment is affirmed, with costs—What costs are recoverable—Code of Civil Procedure, sections 3228-3230.

Where, in an action in which costs are in the discretion of the court, a judgment is rendered in the supreme court, without any provision for costs, and on appeal to the court of appeals such judgment is affirmed, with costs, the only costs recoverable are the costs in the court of appeals.

The defendant H. had assigned a mortgage to the insurance company, with guaranty of payment. The plaintiff, as the receiver of the insurance company, commenced an action to foreclose the mortgage, making H. a party defendant. H. defended upon the ground that his guaranty of payment was discharged by the neglect of the company to foreclose, as he requested it to do. His defense was sustained at both circuit and general term, but overruled in the court of appeals, which court "did order and adjudge that the judgment of the general term of the supreme court appealed from as relates to defendant H. be and the same is hereby reversed and modified by inserting a provision adjudging the defendant liable for any deficiency, and, as so modified, affirmed, with costs to the appellant."

Held, that as the judgment of the lower court is modified so as to render a judgment in favor of the plaintiff, but without costs, and as so modified is affirmed, with costs to the appellant, costs in the court of appeals only, and no other are given.

First. The plaintiff was not entitled to recover costs in the supreme court as of course.

Second. The supreme court neither at special or general term has awarded them.

Third. The court of appeals has awarded costs only in that tribunal; and,

Fourth. As costs have never been allowed for the proceedings in this court, the allowance of them to the plaintiff by the clerk was erroneous.

Ulster, Special Term, December, 1882.

MOTION to readjust costs.

Newcomb agt. Hale.

De Witt Roosa, for motion.

N. C. Moak, opposed.

WESTBROOK, *J.* — The defendant Matthew Hale had assigned a mortgage to The Atlantic Mutual Life Insurance Company with a guaranty of payment. The plaintiff, as the receiver of the insurance company, commenced an action to foreclose the mortgage, making Hale a party defendant. Hale defended upon the ground that his guaranty of payment was discharged by the neglect of the company to foreclose as he requested it to do. His defense was sustained at circuit and general term, but overruled in the court of appeals, which court (to use the exact language of the *remittitur*) "did order and adjudge that the judgment of the general term of the supreme court, appealed from as relates to defendant Hale, be and the same is hereby reversed and modified by inserting a provision adjudging the defendant liable for any deficiency, and as so modified affirmed, with costs to the appellant."

After the decision of the court of appeals the plaintiff procured his costs to be taxed by the clerk of the county of Albany, who, against the objection of the defendant Hale, allowed to the plaintiff costs and disbursements in the supreme court to the amount of \$158.15. The present motion presents the propriety of that allowance.

It is well settled that when the court of appeals reverses a judgment, "with costs to abide the event," that the party who eventually succeeds recovers costs for all the different steps in the cause (*First National Bank of Meadville* agt. *The First National Bank of New York*, 84 N. Y., 469; *Donovan* agt. *Vandemark*, 22 Hun, 307; *Sanders* agt. *Townshend*, 63 How., 343). The reason of this is apparent. The costs in the court of appeals are by the order made to depend upon the final event; and when the final judgment awards to the prevailing party costs of the action he recovers those in the court of appeals by force of its order, which gave to the lower tribunal express power to award them, and those for the pro-

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ceedings had in such lower tribunal, because its judgment giving them was within its statutory authority over costs for steps taken in an action whilst within its jurisdiction and under its control. The reasons, however, upon which the cases referred to depend — that the lower tribunal can award costs for proceedings in the court of appeals, whenever such latter court authorizes it so to do, and that the former has the original power to award costs in an action for such proceedings therein as were had before it — so far from sustaining the allowance to the plaintiff of the costs in this action while it was pending in this court are opposed to such allowance. Certainly this court has not either at general or special term ordered judgment for the plaintiff against the defendant Hale, with costs of the action, and if the taxation of the clerk of Albany county is to be sustained it can only be upheld by showing that the judgment of the court of appeals awards them. Has it done so? Its order does not direct, as the counsel for the plaintiff argued, the judgment of the general term to be reversed and modified “by inserting a provision adjudging defendant Hale liable for any deficiency,” with costs of the action. If it did, then it could be plausibly and perhaps successfully said that as the roll so amended provided for a judgment against Mr. Hale, with costs, the plaintiff should recover costs of the action. The amendment which the order directs to be made to the judgment does not, however, direct that the judgment against the defendant shall be with costs. On the contrary, the only amendment to be made to the judgment of the general term is, that it shall declare “Hale liable for any deficiency;” and then the order further provides that the judgment “as so modified,” to wit, a judgment against Hale for any deficiency, without any declaration or provision as to costs, is “affirmed, with costs to the appellant.” The question therefore which this case presents is, when a judgment by the general term is modified so as to provide for a recovery against a defendant in a certain contingency, and no costs are adjudged against the defendant as a

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part of such recovery, and such judgment "as so modified" is "affirmed, with costs to appellant;" what costs are recoverable? In other words, suppose in an action in which costs are in the discretion of the court (and that this is such an action will presently be shown) a judgment is rendered in the supreme court, without any provision for costs, and that on appeal to the court of appeals such judgment is affirmed, with costs, what costs are recoverable? Such a question would seem to admit of only one answer, and that is, an affirmance in the court of appeals of a judgment or order, with costs, means costs in the court of appeals only. If the judgment or order affirmed gave costs, the successful party would obtain costs in the lower court by virtue of the original judgment or order which was affirmed, but if the order or judgment appealed from and sustained gave no costs, the party succeeding on the appeal would not recover costs in the lower courts. Precisely such a case this motion presents. The judgment of the lower court is modified so as to render a judgment in favor of the plaintiff, but without costs, and as so modified is affirmed, with costs to the appellant. This provision clearly gives only costs in the court of appeals and no other.

It is argued, however, that the judgment of the court of appeals reversed the judgment of the lower court, and that costs in the lower court follow. That may be so in a case in which costs are a part of the recovery as matter of right. This is not such a case, as will presently be shown, but the right to recover costs in the supreme court, as the supreme court has not awarded any, depends entirely upon the judgment of the court of appeals. The attempt has been made by an analysis of the language of the *remittitur* to show that no costs in this court have been given. It is useless, however, to argue, as the court of appeals has construed the meaning of language similar to that contained in the order in this case. In *Sisters of Charity agt. Kelly* (68 N. Y., 628) it was held, "When costs are given by the judgment of this court *it means costs in this court* to the successful party as against the unsuccessful party."

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The report of the case is not full, but inquiry of counsel has developed the following facts: A will offered for probate had been rejected on the ground of defective execution. The supreme court at general term reversed the decree of the surrogate, and the decision of the court of appeals was: "Judgment of the general term reversed and decree of surrogate affirmed, with costs." In holding, then, in *Sisters of Charity* agt. *Kelly*, that an order reversing the general term and affirming a surrogate's decree, "with costs," only gave costs in the court of appeals, that tribunal has so construed words similar to those used in this case as to render impossible the construction claimed for them by the plaintiff in this action.

It was also urged on the part of the plaintiff that he is entitled to recover costs in the supreme court by subdivision 4 of section 3228 of the Code of Civil Procedure, which entitles the plaintiff "to costs, of course, upon the rendering of a final judgment in his favor" in an action "in which the complaint demands judgment for a sum of money only." The present case was not one of that character. As against the defendant Hale, the relief sought, if any was given, might result in a judgment for money only, but the relief demanded by the complaint was not a "judgment for a sum of money only." On the contrary, the action was for a foreclosure of a mortgage and the sale of the mortgaged premises as the primary and principal relief, and as the secondary and final relief the complaint asked for a personal judgment against Hale for any deficiency arising upon the sale. The same relief was asked against Mr. Hale that is generally asked against the obligors of a bond which ordinarily accompanies a mortgage, and in the present action, no more than in one brought to foreclose a mortgage to which the obligors executing the bond accompanying it are made parties for the purpose of making them liable for any deficiency upon the sale, can it be truly said that the sole relief demanded by the complaint is a money judgment. The position of the plaintiff, that costs are recoverable by him in this case as of course under the section of the

The People *ex rel.* Panama R. R. Co. agt. Commissioners of Taxes.

Code referred to, is not maintainable. On the contrary, as has been shown, that section does not apply, and section 3230, which places costs in the discretion of the court, does. It is true that if the plaintiff had sued Mr. Hale directly upon his covenant he would have been entitled to his costs as of right. He did not however do so, but on the contrary he brought an action to foreclose a mortgage, making him a party to it, and it has been expressly decided (*Lossee agt. Ellis*, 13 Hun, 655) that "in an action to foreclose a mortgage the costs are in the discretion of the court" (*See, also, Herrington agt. Robertson*, 71 N. Y., 280, 284).

The conclusions from the foregoing reasoning are clear. First. The plaintiff was not entitled to recover costs in the supreme court as of course. Second. The supreme court, neither at special or general term, has awarded them. Third. The court of appeals has awarded costs only in that tribunal; and Fourth. As costs have never been awarded for the proceedings in this court, the allowance of them to the plaintiff by the clerk was erroneous.

The motion of the defendant is therefore granted, but as the question is somewhat novel and the plaintiff has succeeded in the action, no costs are allowed thereon.

SUPREME COURT.

THE PEOPLE *ex rel.* THE PANAMA RAILROAD COMPANY agt.
THE COMMISSIONERS OF TAXES OF THE CITY AND COUNTY OF
NEW YORK AND THE BOARD OF ALDERMEN OF THE CITY OF
NEW YORK.

Corporations — Taxation of capital stock — How to be assessed.

The capital stock of a corporation is properly assessed at its actual and not its par value.

Special Term, February, 1883.

The People *ex rel.* Panama R. R. Co. agt. Commissioners of Taxes.

WRITS of *certiorari* have been allowed in this case to review the action of the tax commissioners upon an assessment made by them upon the personal estate of the relator for the year 1882.

The par value of its stock (as shown by the return to the writs) was \$7,000,000. The commissioners took its actual value — \$14,250,000 — as the basis of their assessment, and made the following tabular statement as the result of their action :

Capital stock of the relator.....	\$7, 000, 000
Value of capital stock, fixed by us after full and careful examination at 204.....	14, 280, 000
Deduct ten per cent of capital stock.....	700, 000
	<hr/>
	\$13, 580, 000
Deduct amount paid for real estate.....	8, 922, 870
	<hr/>
Amount of assessment.....	<u>\$4, 657, 130</u>

The relator contends that its stock cannot be legally assessed beyond its par value; that the amount invested by it in real estate (\$8,922,870) must first be deducted from such par value, and consequently, that after the exemptions allowed by the statute, it owns no personal property which is the subject of taxation within the city and county of New York.

No traverse has been made to the return, and the question presented for adjudication is the validity of the action taken by the commissioners in making the assessment set forth in their return to the writ.

W. D. Shipman, for relator.

Geo. P. Andrews and *James C. Carter*, for respondents.

LARREMORE, *J.*— It must be assumed, upon the papers submitted, that the stock in question was at a premium of 104 when the assessment was made. Its then actual value was

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\$204 per share, and upon such valuation it was properly assessed in pursuance of section 3, chapter 456, Laws of 1857 (*Oswego Starch Factory* agt. *Dolloway*, 21 *N. Y.*, 455; *The People* agt. *Dolan*, 36 *N. Y.*, 62; *Same* agt. *Ferguson*, 38 *N. Y.*, 91; *Same* agt. *McLean*, 80 *N. Y.*, 254; *The People* agt. *Broadway and Seventh Avenue R. R. Co.*, 1 *Thomp. & Cook*, 635).

There is nothing in *The People* agt. *Board of Assessors of the City of Brooklyn* (39 *N. Y.*, 81) to disturb this doctrine, for in that case the question of appreciation in the value of the stock was not involved. The motion to quash the writs should be allowed, without prejudice to an application on the part of the relator to show what proportion of the actual value of its capital is invested in real estate.

SUPREME COURT.

JESSE HALL, administrator, &c., agt. RICHARD VAN
VRANKIN.

Evidence — Comparison of a disputed writing with any writing proved to be genuine — Proof of genuineness addressed to the court — Laws of 1880, chapter 36 — Sufficiency of proof.

The statute of 1880, chapter 36, permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine. This proof of genuineness is addressed to the court in distinction from the jury, and error cannot be alleged in respect thereto. Where in an action on a promissory note a deed acknowledged by the defendant was offered for the purpose of comparing the signature, the defendant being present at the trial and making no offer to disprove the genuineness of the signature to the deed:

Held, that there was no error in the admission of the deed for comparison only. There was not an absence of all evidence as to the genuineness of the signature to the deed, and therefore there was no error in this respect.

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Identity of name coupled with the fact that the defendant made no offer to disprove the assertion that he was the signer of the deed, was enough to authorize the court to hold the signature of the deed to be the defendants.

Third Department, General Term, September, 1892.

Before LEARNED, P. J., BOCKES and WESTBROOK, JJ.

APPEAL from a judgment of the Fulton county court affirming a justice's court judgment.

Action to recover upon a note to plaintiff's intestate, alleged to have been made by defendant, the making and delivery of which the latter, by his answer, denies. He also pleads payment.

All that appears on the part of plaintiff, as fact, with reference to the making and delivery of the notes is, that it came to plaintiff's hands with other effects of his intestate; that defendant admitted to plaintiff that he knew there was such a note, but that it was paid; that a relative of defendant's, the witness Phair, told plaintiff the note against the defendant was all right, had not been, but would be paid. The testimony as to the relative's assertion was objected to. The plaintiff was also permitted to testify, under objection, that Phair never told him the note was paid.

Plaintiff did not attempt to disprove the defendant's assertion that the note was paid. And he expressly stated that he did not know whether or not it was paid. A witness for defendant states that he heard plaintiff's intestate tell defendant he would bring the note to him; and that subsequently he heard him tell defendant he could not find the note; he had either lost or destroyed it.

At the close of his case, plaintiff was permitted to announce his opinion, based upon the evidence he had before him, that the signature to the note was defendant's. Defendant objected.

Plaintiff introduced a deed for the purpose of using the grantor's signature thereto as a standard by which to compare the signature to the note. There was no proof that the sig-

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nature to the deed was that of defendant. Experts were then called to make the comparison. All this was duly objected to.

On cross-examination of plaintiff, he was shown the note and was asked: Is that the signature of defendant attached thereto? An objection to the question was sustained.

On this evidence, the justice rendered judgment in favor of the plaintiff and against the defendant for the amount of the note and costs. On appeal, on the law of the case, the county court affirmed it, delivering the following opinion:

BAKER, County Judge. — This was an action brought upon a promissory note by the plaintiff as administrator of the goods and chattels of Eber C. Durkee, deceased. The defense was a general denial and payment. Judgment was rendered in the court below in favor of the plaintiff for fifty-nine dollars and ninety cents damages and five dollars and eighty cents costs, in all sixty-five dollars and seventy cents. The defendant has appealed to this court and claims that the justice erred in refusing to permit the defendant to answer certain questions in regard to the making and execution of the note in suit; also, that the justice erred in the admission of a deed in evidence to form the basis of comparison in handwriting.

I think the question asked the defendant had reference to transactions had with himself and deceased.

The following are the questions put to the defendant:

Did you have dealings with him (Durkee) during his lifetime? Did you, on or about May 21, 1878, make and execute a promissory note to Eber C. Durkee? Is the signature to plaintiff's exhibit "B" (the note) yours? Have you paid the note?

The plaintiff objected to these questions and the justice sustained the objections.

The answers to the questions would not have been in reply to any evidence given on the part of the plaintiff.

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Evidence that would lead to the inference that a personal transaction took place between the deceased and defendant in relation to the note, I think, is inadmissible under section 839 of the Code. The evidence called for by the question would have reference to matters or transactions between the defendant and deceased, and might have been contradicted by the deceased had he been living.

I see no error on the part of the justice in refusing to allow the defendant to answer these questions. By chapter 36, Laws of 1880, comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine is permitted. The introduction and receiving the deed in evidence in the case at bar was for the purpose of forming a basis of comparison. Under section 935 of the Code the deed offered in evidence was proper in form, and raised the presumption that it was signed by the person it purports to have been signed by, and if this deed satisfied the justice as to the genuineness of the signature he had the right to receive it in evidence, in order that the comparison between it and the disputed writing might be made. I am of the opinion that no error was committed in receiving the deed in evidence. If the justice was right in his rulings as to the admissions of evidence in the case—and I fail to see any errors—that would warrant a reversal of the judgment. The question as to the giving of the note and its payment were questions of fact that were disputed on the trial, and the justice having decided these questions, his decision must be final.

If I am right in my views in regard to this case, it follows that the judgment should be affirmed.

A. J. Nellis, for appellant.

I. The comparison permitted to be made by the experts between the signatures to the deed and the note in question was error. The statutes permits comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine (*Laws of 1880, chap. 36*). In other states

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where the common-law rule has been thus, by statute or otherwise, relaxed, it is nevertheless held that the standard of comparison sought to be introduced must be either admitted to be genuine, or proved so to be by undoubted evidence (*McKeone agt. Barnes*, 108 *Mass.*, 344; *Pavey agt. Pavey*, 30 *Ohio St.*, 600; *Van Sickle agt. People*, 29 *Mich.*, 61; *State agt. Hastings*, 53 *N. H.*, 452; *Travis agt. Brown*, 43 *Penn. St.*, 9; *Baker agt. Mygatt*, 14 *Iowa*, 131; *Heard agt. State*, 9 *Tex. App.*, 1). In this case the genuineness of the signature to the deed is not admitted. 1. Under our statute, giving it the most liberal construction possible, there must be some proof as to the genuineness of the standard. On this point the trial court cannot be arbitrarily satisfied. The acknowledgment to the deed in question was no proof that the grantor affixed his signature thereto with his own hand. If one acknowledges and delivers a deed which has his name and seal affixed to it, the deed is valid, no matter by whom the name and seal were affixed, or whether they were affixed with or without the grantor's consent. By the acknowledgment the grantor declares, not that he wrote the signature or any other part of the instrument but that he adopts the whole instrument as his act and deed. So held in a case where the grantor's name was affixed by the grantee (*Clough agt. Clough*, 73 *Me.*, 487); by the grantor's wife in his absence (*Bartlett agt. Drake*, 100 *Mass.*, 174); by a third party in the grantor's presence (*Gardner agt. Gardner*, 5 *Cush.*, 483). By an act equivalent to the acknowledgment of a deed, a person may adopt a forged signature upon commercial paper (*Greenfield Bank agt. Crafts*, 4 *Allen*, 447). In 1855, section 2404 of the Iowa Code provided that "evidence respecting handwriting may be given by comparison made by experts, or by the jury, with writings of the same person proved to be genuine." And it was held under this section that the acknowledgment of a mortgage was not evidence of the mortgagor's signature so as to permit it to be used as a standard of comparison (*Hyde agt. Woolfolk*, 1 *Iowa*

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[1 *Clarke*], 159). The court say the grantor does not acknowledge that the signature is in his handwriting; he acknowledges the conveyance, and thereby adopts the signature, though a third party may have written it. In *Martin* agt. *Maguire* (7 *Gray*, 177) it was held that a party to an action by reading a deed to the jury did not admit that the signature was in the handwriting of the person whose name appeared as grantor therein, so as to permit its use as a standard of comparison. The court say it might be a valid and legally executed deed, though the name was written by some other person. The learned county court seems to think that the deed was properly introduced as a standard of comparison because section 935 of the Code of Civil Procedure makes an acknowledged deed evidence without further proof thereof. If his view is the correct one, the record of the deed, or a transcript thereof, would have been equally proper as a standard of comparison; for the same section declares that such record or transcript is evidence, with like effect as the original conveyance. The whole section clearly shows that an acknowledged deed is evidence only of the fact of a conveyance; not that the instrument by which the conveyance is made, or any part of it is in the handwriting of the grantor; it is evidence of such fact as can be as well proved by the record of the deed or a transcript from such record, and nothing more.

2. Even if the acknowledgment of the deed raises a presumption that the signature was in the grantor's handwriting, yet, before the signature can be used as a standard of comparison, there must be some proof of the identity of the grantor and the defendant. For, to prove the signature of a person, it is not enough to show that it is the same with the signature of a man bearing the same name, but it must be proved to be written by the same person (*Kinney* agt. *Flynn*, 2 *R. I.*, 319). In the case at bar, the deed introduced as a standard of comparison was made in 1860, by a party living in Saratoga county. The note was made in 1879, in the county of Fulton, where the case shows the defendant resided. But no proof of the

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identity of the makers of these several instruments was offered. And from the difference in time and place, the presumption should be that they were not the same party.

N. H. Anibal, for respondents.

I. No error was committed by the justice in permitting the deed "Exhibit C," to be received in evidence and to use the signature thereto as a basis of comparison with the signature of the note in question. 1. A comparison of a disputed writing with any writing, proved to the satisfaction of the court to be genuine, is permissible, and is proper evidence to be submitted to the court of the genuineness of the defendant's signature to the note in question (*Chap. 36 of Laws of 1880*). 2. The deed in question was duly acknowledged before a justice of the peace of Fulton county and proves itself, and presumptively proves the signature to the deed to be in the handwriting of the defendant (*Sec. 935 of Code; Morris agt. Wadsworth, 17 Wend., 103; Thurman agt. Cameron, 24 Wend., 87; Abbott's Trial Ev., 6; Clark agt. Noxon, 5 Hill, 36; and many other cases*). 3. The testimony of the witness Phair shows the full name of the defendant to be Richard G. Van Vranken, the same name as that attached to the deed and identity of persons is presumed from identity of names (*People ex rel. Haines agt. Smith, 45 N. Y., 772, see opinion, 779; Abbott's Trial Ev., 398; Jackson agt. King, 5 Cow., 237, opinion, 240, 242; Jackson agt. Boneham, 15 Johns., 226, 227; Hatcher agt. Rocheleau, 18 N. Y., 86; Jackson agt. Goes, 13 Johns., 518; Jackson agt. Cady, 9 Cow., 140; 1 Whar. Ev., sec. 701; 2 Whar. Ev., sec. 1273; 4 N. Y. Legal Observer, 424*). 4. The name of defendant is the same as that of the signature to the note. The middle letter, "G," which appears in the name of defendant, and also in the signature to the deed, is omitted in the note, but the law recognizes but one christian name and one family name. A separate single letter is not a name (*Frank agt. Levie, 5 Robt., 509; 5 Johns., 84; 2 Cow., 463*). The omission of the

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middle letter of defendant's name is an immaterial variance and does not affect defendant's liability (*Van Voorhis* agt. *Budd*, 39 *Barb.*, 479; *Milk* agt. *Christie*, 1 *Hill*, 102). 5. The testimony of witnesses West and Fry show that the signature to the note is in the same handwriting as the signature to exhibit "C," the deed. The deed and note were both inspected by these witnesses and also by the justice. 6. It may be claimed that the acknowledgment proves the execution of the deed, but not that the signature thereto is that of the defendant, but the execution of a deed consists of three distinct acts, viz., signing, sealing and delivering (1 *Bow. Law Dic.*, 553; *Whar. Law Dic.*, 217, 234; *Web. Unabridged Dic.*, 477). And Webster defines the word "sign" as follows: "To subscribe in one's own handwriting." 7. Under chapter 36 of the Laws of 1880, it is not necessary to absolutely prove that the signature to the deed is that of the defendant. It having been presumptively proved that such signature was his, he should have denied that such was the fact if he desired to rebut that presumption (*Sec. 936, Code of Civil Pro.*; 5 *Cow.*, 242; *Jackson* agt. *Goes*, 13 *Johns.*, 518; *Jackson* agt. *Woodruff*, 9 *Cow.*, 139). 8. The deed purports to have been signed by defendant. Defendant was present in court and might have testified that the signature thereto was not his, but he did not offer to do so.

LEARNED, J. — The statute of 1880 (*chap. 36*) permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine. This proof of genuineness therefore is addressed to the court in distinction from the jury. The evidence on this point is not direct evidence upon the merits. It is somewhat analogous to evidence tending to prove the competency of one who is called as an expert and the like.

And the general rule in regard to such classes of evidence is that, as the evidence is addressed to the court, error cannot be alleged in respect thereto. The degree of proof which

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shall show that a witness has experience enough to testify as an expert must be left to the trial judge. So too the sufficiency of the proof which shall show that a paper is genuine so that it may be used for comparison must be also left to the trial judge. Possibly to admit a paper without any evidence of its genuineness might be error.

Now in this case a deed executed and acknowledged by the defendant was admitted for the purpose of comparison with the disputed note. And the defendant objects to this.

Of course a person whose name had been signed to a deed might acknowledge the instrument, and thus adopt a signature made by some other person. And therefore an acknowledgment of a deed is not conclusive evidence that the signature is that of the party. But it is certainly *prima facie* evidence of that fact. In the very great majority of cases signatures to deeds are made by the parties thereto. The cases are rare where a party adopts a signature made by another person.

If a person on borrowing money were to deliver a note purporting to have been signed by him, would not that be *prima facie* evidence that the signature was in fact his own? True he might have caused some one else to sign for him, and by adopting the signature might bind himself. But in the majority of cases such signature would be genuine, and it is therefore *prima facie* to be considered.

Witnesses have often testified to a knowledge of handwriting based on correspondence with the party. Now in such cases the correspondence might possibly have been written by some other person with the authority of the party whose name was used. Yet, inasmuch as persons usually write their own letters (unless the letters otherwise indicate), a knowledge of handwriting gained by correspondence makes a witness competent; although the witness never saw the party write.

Now, in the present case, a deed acknowledged by the defendant was offered for the purpose of comparing the

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signature. The defendant was present at the trial. He made no offer to disprove the genuineness of the signature to the deed, a matter which he could easily have done, if it had not been genuine; and it was thereupon admitted for comparison only.

The defendant urges that this was improper, because he says that a certified copy from the record would, on this principle, be equally proper as a standard of comparison (*Code C. P.*, 935). But there is no weight in that argument. A certified copy does not purport to contain the signature of the party, but on the contrary purports to contain a copy thereof. The original deed purports to contain the genuine signature.

We think there was not an absence of all evidence as to the genuineness of the signature to the deed. And therefore there was no error in this respect.

It is again urged that there was no proof of identity between the signer of the deed and the defendant. Identity of name coupled with the fact that the defendant made no offer to disprove the assertion that he was the signer of the deed was enough to authorize the court to hold the signature of the deed to be the defendant's.

The plaintiff was asked whether that was the signature of the defendant attached to the note; and this was excluded. It did not appear that the plaintiff had any knowledge as to the making of the note or as to the defendant's handwriting. It does not seem therefore that he could have given any evidence in aid of the defendant's case on this point.

He afterwards stated that from the evidence before him the signature was defendant's. That testimony was objected to after it had been given. But there was no ruling. It proved nothing and was of no consequence.

On behalf of the defendant one Phair has testified that the signature to the note was not the defendant's. In order to discredit this testimony he was asked on cross-examination as to certain statements which he had made to the plaintiff respecting this note. And afterwards the plaintiff was allowed to

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contradict Phair's testimony on this point. The testimony of Phair on his cross-examination was not so collateral that the plaintiff might not contradict it.

The admission of the defendant as to the existence of the note was coupled with the assertion that it had been paid. The fact that the note was still in the possession of the plaintiff tended to contradict the defendant's assertion that it had been paid.

The important question in this case is that which is first discussed in the opinion. The others are of little consequence. And we may add, that under the Iowa statute referred to the instrument used for comparison is to be "proved to be genuine" — not proved to the satisfaction of the court. Thus it would seem that the question of genuineness in that state is one for the jury.

We cannot for that reason give much weight to *Hyde agt. Woll* (1 *Iowa*, 159). An examination of the opinion in this case convinces us that it cannot be taken as a well considered exposition of the law. Doubt is therein expressed whether a writing used for comparison can be proved by the testimony of witnesses who have only seen the party write, if they have not seen him write that identical paper. And the court, in that case, does not appreciate the reason of the old rule (abolished by the statute under consideration) which forbade the introduction of writings merely for the purpose of comparison.

The statute allowing comparison of writings is most beneficial. Any one who has had experience in the trial of questions of disputed handwriting must have seen the worthlessness of expert testimony. Nothing can be so useful on this class of questions, which are generally perplexing, as to permit an examination with other writings proved to be genuine to the satisfaction of the court. And on this collateral matter we may safely repose a liberal discretion in the trial judge who sees much from the conduct of the parties that does not appear on appeal papers.

Judgment affirmed, with costs.

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Wilds agt. St. Louis, Alton and Terre Haute Railroad Co.

SUPREME COURT.

HOWARD PAYSON WILDS agt. THE ST. LOUIS, ALTON AND
TERRE HAUTE RAILROAD COMPANY and others.*Trust deed — Mortgage agreement — Obligation to pay interest when not suspended.*

The defendant corporation gave a first mortgage on its property and franchises, in which it was provided that \$12,500 of the surplus of its net earnings, after paying interest on the bonds secured by the mortgage, should be paid semi-annually to the mortgage trustees, as a sinking fund for the redemption of the bonds. The moneys in this fund, with the accumulations of interest thereon, were to be invested in the purchase of these bonds, if such purchase could be made at not exceeding ten per cent above par, the bonds so purchased to be indorsed as belonging to the sinking fund, and they were to "remain in force" and the interest thereon was to be continued to be paid as part of the capital of the sinking fund. In case the bonds could not be purchased at ten per cent above par, no further payment was to be made to the sinking fund until the price lowered to that point, when such payment of \$12,500 semi-annually was to be resumed. Purchases of bonds were made until January, 1879, when they advanced in value beyond the limit imposed. But interest on the bonds held for the sinking fund continued to be paid. In this action, by a preferred stockholder of the corporation, to restrain this payment:

Held, (1) That the obligation to pay interest on the bonds in the sinking fund has not by the terms of the mortgage been suspended. (2) The provision of the Illinois statute, that the payments into the sinking fund shall not exceed two per cent of the gross earnings, means that such payment shall not exceed two per cent of the gross receipts of the year in which the payments are made; and at any rate, as the company already had a corporate existence under the laws of Indiana, the provision of the Illinois statute could not affect the terms of the mortgage agreement.

*Special Term, August, 1882.**Thomas Thacher*, for plaintiff.*Abraham Van Sinderen*, for defendants, trustees.*John McL. Nash*, for railroad company, defendant.

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VAN VORST, J. — The plaintiff is a preferred stockholder of the St. Louis, Alton and Terre Haute Railroad Company, and brings this action to restrain the company from making certain payments to the sinking fund created by the first mortgage on the railroad property and franchises, and to determine the meaning and effect of certain provisions contained in the first mortgage, and of portions of the statute under which the corporation exists. The mortgage was given to Robert Bayard and others, in trust, for the purposes therein expressed.

Article sixth of the mortgage contains the matter which, in part, has given occasion to this action. It is provided in that article, in substance, that at the end of every sixth month during which the net earnings of the railroad shall exceed the amount necessary to pay the interest upon all bonds of the company secured thereby, and then outstanding, the surplus, to the amount of \$12,500, shall within sixty days be paid over to the trustees as a sinking fund for the redemption of the bonds secured by the mortgage.

It was furthermore provided in article 6 that the surplus so paid over to the trustees should by them be deposited in the United States Trust Company of the City of New York, or in some other safe depository in that city, and that the moneys, together with accumulations of interest thereon, should be invested by the trustees in the purchase of bonds secured by the mortgage, provided that the same could be purchased at a rate not exceeding ten per cent above their par value, with the accrued interest thereon, and that the bonds so purchased should be deposited with the United States Trust Company, and be immediately stamped or indorsed as belonging to the sinking fund; but that they should "remain in force," and that the interest thereon should continue to be paid by the railroad company, and that the amount of interest so paid shall be added to and be applied as a part of the capital of the sinking fund, and be invested in the purchase of other bonds in the same manner as the semi-annual pay-

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ment of \$12,500 therein provided for. And it was further provided in article 6 that in case the bonds for the sinking fund could not be purchased for a sum not exceeding ten per cent above their par value that "then the said money shall remain at interest until bonds can be purchased therewith at public or private sale at such rates, and no further payments shall be payable to the said sinking fund till the money so remaining in the said fund can be used in purchasing said bonds at said rate or under, when such payment of twelve thousand and five hundred dollars semi-annually shall be resumed."

In pursuance of the terms of the mortgage the sinking fund has been actually created, and a large amount of money has been paid by the railroad company to the trustees for its purposes.

Until about the 1st day of January, 1879, the first mortgage bonds stood at such a price in the market that all the moneys theretofore paid for the purposes of the sinking fund could be and were in fact invested in the purchase of bonds by the trustees; and at that date bonds to the extent of \$636,000 had been so purchased. But since that time the bonds have advanced in value beyond the limit imposed and on that account purchases thereof have ceased.*

Since the year 1879 the company has not made the semi-annual payments of \$12,500 to the trustees, but it has continued to pay the interest on the bonds held for the sinking fund.

This continued payment of interest on the bonds purchased for the sinking fund is objected to by the plaintiff, it being in substance urged on his behalf that such payment is a wasteful use of corporate funds, as the money cannot be used in the purchase of other bonds, which at present rule in the market at a price above that limited.

* A construction is given to this mortgage and the duties of the trustees thereunder in *Clark agt. St. Louis, Alton, etc., R. R. Co.* (58 How. Pr. R., 21).

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But whether the corporation should continue to pay interest on such bonds, held for the sinking fund, depends upon the terms of the contract between the mortgagors and the mortgagees, subject to which the present corporation succeeded to the railroad property and franchises upon which the mortgage is a lien.

The bonds, after being purchased by the trustees for the sinking fund, were, as has been above stated, directed to be deposited with the trust company, and to be stamped "as belonging to the sinking fund." They were not by such purchase to be regarded as either paid or canceled, but otherwise they were still, as obligations, to "remain in force," and the interest thereon was to continue to be paid by the railroad company.

The obligation to pay interest remains in force, unless it is changed by the closing words of article 6 of the mortgage which are given above. By these words it is provided that no further payment should be made to the sinking fund until the money remaining therein could be used in purchasing bonds at the price limited.

It is quite clear that the obligation to pay the \$12,500 semi-annually, provided for in article 6, ended so soon as the inability to buy bonds became apparent, and it does not become imperative again, until the disability is removed, when such payments are to be resumed.

It was certainly within the power of the contracting parties, in creating the mortgage or trust deed, to provide that the bonds purchased and deposited in the trust company should remain in force against the company, in so far at least, as the payment of interest thereon was concerned, until the trust should be closed.

Upon a careful consideration of article 6, I cannot find that the obligation to pay interest on the bonds has been suspended. The words "and no further payments shall be payable to the said sinking fund," etc., clearly have reference to the payments of \$12,500 semi-annually, for it is declared, as already

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stated, that when bonds could be again purchased such payments should be resumed. Nothing is said of a resumption of the payment of interest upon the happening of such contingency. For it is to be observed that article 6 of the mortgage created the original obligation to pay \$12,500 semi-annually to the trustees for the sinking fund. The obligation to pay interest is imposed by the bonds themselves, and is recognized by provisions of the mortgage other than article 6. But article 6 is careful to provide that the purchase of these bonds shall not interfere with the company's obligation to pay interest, but that it shall continue to be paid thereafter by the company.

"Payments" which upon the contingency mentioned were for a time to be suspended were such as were specially directed to be made by article 6, the obligation in respect to which is fixed by that article. That the interest so paid should go into the sinking fund and be used with the other moneys in the purchase of bonds does not, it appears to me, affect the construction which has been above given to the clause in question.

It is in this view that the closing words, "when such payments of twelve thousand and five hundred dollars semi-annually shall be resumed," become important, as showing that the payment of interest not having been suspended, no provision for its resumption was necessary.

Whether the arrangement for the creation and maintenance of the sinking fund for the ultimate redemption of the first mortgage bonds was the wisest plan in form and detail which could have been adopted is not open to consideration by the court, so long as it does not contain illegal provisions. The creation, increase and preservation of such a fund is for and during a period of years. And what in any one year may seem unprofitable may in the end turn out to have been the dictate of prudence and forethought.

Stockholders of corporations, as is quite natural, desire to receive dividends on their stock, and the larger the better;

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but it often turns out that a part of the money which has gone in this way could have been more advantageously, for all concerned, secured in a sinking fund to pay corporate indebtedness. And courts would reluctantly break into a scheme for the creation of a sinking fund, arranged coincident with the incurring of an indebtedness, which it was designed to secure, and then only when its provisions were of a nature clearly to call for judicial interference. The safety of the money paid into a sinking fund is of more importance than the amount of interest it might earn.

Another objection is however urged by the learned counsel for the plaintiff, to the effect that the payments made to the sinking fund in amount transgressed the limits imposed by the statutes of the state of Illinois. Section 11 of the Illinois statute of February 18, 1861, amongst other things, enacts that, "in providing for a sinking fund for the retirement of such bonds, which sinking fund shall not exceed two per cent of the gross earnings of said road in each year," etc.

The meaning of this clause has been made the subject of much discussion by the counsel engaged. Although the subject is not free from doubt, yet I apprehend that the true meaning is, that the annual payments to the sinking fund shall not exceed two per cent of the gross receipts of the year in which the payments are made.

But it must be borne in mind that when the purchasers of the property of the former corporation, to which the present one succeeded, took advantage of the provisions of the act of February 18, 1881, by making and filing the certificate provided for in section 1 of that act, the railroad company defendant herein, was already in existence as a corporation, in pursuance of the provisions of the statute of Indiana passed March 5, 1861.

The certificate of incorporation filed by the purchasers of the railroad property under the Indiana statute bears date June 19, 1862, and was filed in the office of the secretary of state of Indiana on the 24th day of June, 1862.

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After such incorporation, and on the 30th day of June, 1862, and before the railroad and its property had been conveyed to the corporation, but in anticipation thereof, the mortgage in question was executed by the purchasers at the sale. And on the same day a second mortgage was executed by the same persons covering the railroad property and franchises. A conveyance was also executed the same day by the same parties to the defendant corporation, organized under the Indiana statute, of all the railroad property, subject to the two mortgages and their provisions. These mortgages and conveyances were without doubt parts of the plan of organization under the Indiana statute.

A certificate was prepared at the same time, in pursuance of the Illinois statute, and appears to have been signed by the same persons who signed the Indiana certificate. It bears date the 19th day of June, 1862. When it was actually signed does not appear. But that I regard as immaterial, as the certificate was inoperative until it was filed in the office of the secretary of state of Illinois (*Sec. 1 of Statute of Illinois, Feb. 18, 1861*). And it was not filed until the 4th day of June, 1863.

So that when the certificate called for by the Illinois statute was filed, the railroad company already had corporate existence, pursuant to the Indiana statute, and as such corporation had made the bonds and had incurred the obligations incident to the mortgages upon the property, including those with respect to the sinking fund.

The making and filing of such subsequent certificate could not modify, relax or change the terms of the agreement made by the purchasers or corporation with the trustees. The holders of the first mortgage bonds succeeded to their interest in pursuance of its terms as originally made.

The agreement with regard to the creation of the sinking fund contained in the mortgage, and the payment made in pursuance thereof, are not in conflict with the statute of Indiana, and if the provisions of the statute of Illinois have been

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transgressed by any act or omission of the defendant corporation since the 4th day of June, 1863, it will remain for the sovereign power to interfere, and should the incorporation under the Illinois statute even be annulled, the corporation would still exist under the statute of Indiana, and the indebtedness of the corporation defendant as created thereunder, and all its obligations, would be preserved to its creditors and others.

I have considered this question for the reason that it was much discussed by the counsel engaged in the argument of this cause. But if the conclusion I have reached should not prove to be correct, there is still another reason for deciding that no relief can be granted to the plaintiff under this head, as the payments to the sinking fund, exclusive of the interest paid on the bonds held by the trust company, do not equal two per cent of the gross earnings for any year.

Besides, the Illinois statute itself provides, that the interest on the bonds "which now are a lien as well as those to be hereafter issued" shall first be paid from the earnings, and after that, payments into the sinking fund are provided for.

I cannot say, under the terms of the mortgage, that the lien of the bonds held in the trust company is gone; it is declared in express words that they "shall remain in force, and that interest thereon shall continue to be paid."

If the terms in which the sinking fund is created are carried out, a time will come when all the bonds will in equity cease to be a lien, and no further interest be demandable upon them. Then the trust will be closed by the operation of the sinking fund itself, or by a direction of the court, which would compel the application of the moneys in the hands of the trustees to the payment of the bonds, if sufficient for the purpose, and the satisfaction of the mortgage given to secure their payment. As I cannot discover that the plaintiff is entitled to any relief, there should be judgment dismissing the plaintiff's complaint.

Lyon agt. Baxter.

SUPREME COURT.

SAMUEL B. LYON, as administrator, &c., respondent, agt. JOHN BAXTER, impleaded, appellant.

Summons by publication — Requisites of affidavit on which to obtain order.

An affidavit on which an order for service of a summons by publication is asked, which is entirely on information and belief as to the non-residence of the defendant, without stating the ground of deponent's information, is insufficient.

First Department, General Term, January, 1883.

Before DAVIS, P. J., BRADY and DWIGHT, JJ.

APPEAL from an order denying defendant's motion to set aside an order for service of summons upon him by publication. The affidavit on which the publication order was obtained was entirely on information and belief, without stating the grounds of deponent's information. It was accompanied by the usual sheriff's certificate that defendant was a non-resident, and with due diligence could not be found.

David J. H. Willcox, for appellant.

Henry M. Whitehead, for respondent.

PER CURIAM.—The proof as to the non-residence of the defendant rested mainly upon information, *i. e.*, what some other person or persons said on the subject when not under oath. If that is to be accepted as sufficient, then such an order as that granted herein can be obtained against any person. For nothing is easier than to secure such information. It does not rise to the dignity of proof, in any legal acceptance of that term, and it has not been accepted save in rare cases, and then only when guarded by careful qualification. This case is not within that class of cases, and the order must therefore be reversed, with ten dollars costs and the disbursements of this appeal.

Searing agt. Goodstein.

N. Y. COMMON PLEAS.

LAURA C. R. SEARING, appellant, agt. HENRY GOODSTEIN,
respondent.

*District courts—Right to an execution against the person in actions in—
Such right depends upon the nature of the action and not upon the manner
of commencing it—Code of Civil Procedure, sections 8017 to 8022, 8209,
8220, 2895.*

Though under the district court acts there could be no execution against the person in an action in the district courts, unless the action had been commenced by warrants; since the enactment of the Code of Civil Procedure, which requires all actions to be begun by the service of summons, the right to a judgment making defendant liable to execution against his person depends upon the nature of the action, and not upon the manner of commencing it.

General Term, January, 1883.

THIS action was commenced in the district court of the city of New York for the fourth judicial district, by summons. Upon the return of the summons the plaintiff, by way of complaint, alleged that the defendant had converted to his own use certain property belonging to her. The defendant answered by a general denial. The cause being tried, the justice found in favor of the plaintiff for fifty dollars damages and twenty-two dollars and fifty cents costs and extra costs.

The counsel for the plaintiff thereupon requested the justice to insert in the judgment the words "defendant subject to arrest and imprisonment upon execution," which the justice refused to do, and to which refusal the plaintiff's counsel excepted.

The plaintiff thereupon appealed to this court.

Edward W. Searing, for appellant.

William Rothchilds, for respondents.

VAN BRUNT, J.—The question involved in this appeal is as to the right of the plaintiff herein to have inserted in the

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judgment the words above mentioned, no warrant or order of arrest having been issued in the action.

In the case of *Glacius* agt. *Moldtz* it was expressly decided by the general term of this court, that under the district court act such words should not be inserted unless the action had been commenced by warrant; that as a defendant could only be arrested in an action commenced by a warrant, and as the action was commenced by a summons, no execution against the person could issue.

The repealing act, chapter 245 of the Laws of 1880, among other things has repealed section 10 of chapter 346 of the Laws of 1857, which provides that actions in district courts shall be commenced by summons, warrant or attachment, or by voluntary appearance in person, and pleading without summons, warrant or attachment; and the Code of Procedure, section 3209, has provided that actions in district courts must be commenced by voluntary appearance and a joinder of issue by the parties, or by the service of summons, thus limiting the manner in which actions may be commenced. Section 3220 provides that sections 3017 to section 3022 of this act, both inclusive, apply to a judgment rendered in a district court in the city of New York. Section 3018 provides if the action in which the judgment is rendered is one of the actions specified in subdivision first or second of section 2895 of this act, or if an order of arrest has been granted and has been executed in a case specified in subdivision third of that section, the justice must insert in such transcript given by him, as prescribed in the last section, the words "defendant liable to execution against his person."

Subdivision 1 and 2 of section 2895 of this act refer to actions to recover a fine or penalty, to recover damages for a personal injury, of which a justice of the peace has jurisdiction, an injury to property, including the willful taking, detention or conversion of personal property, &c. It therefore follows, from these provisions of the Code, that the manner of commencing an action does not determine the question

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as to whether the plaintiff is entitled to have the clause in question inserted in the judgment, but that such right depends upon the nature of the action — a different rule prevailing under the district court act.

The cause of action in this case being for the wrongful conversion of personal property, is one of the actions specified in subdivision 2 of section 2895, and consequently the justice was bound to insert in the judgment the liability of the defendant to arrest upon execution.

The judgment must therefore be reversed, with costs.

COURT OF APPEALS.

THOMAS M. MANNING, respondent, agt. DAVID H. GOULD and
OSCAR KING, appellants.

*Suretyship — Undertaking on appeal — Sureties to, when not bound by —
Code of Civil Procedure, sections 1335-1352.*

Sureties to an undertaking given on appeal to the general term of the supreme court, or of a superior city court, when excepted to, and they fail or refuse to justify, and justification is not waived by the respondents, are not bound by the conditions of their undertaking.

Defendants were sureties upon an undertaking on appeal, and were excepted to; G., learning of his principal's death during the examination, refused to go on or remain on the bond. The other defendant refused to appear. Plaintiff took no measures to complete the examination. In an action on the undertaking:

Held, that defendants were not bound by its conditions.

Decided, December 12, 1882.

JANUARY 11, 1880, plaintiff recovered judgment in the superior court of the city of New York against one S. Star Rowland for \$555.49. February 9, 1880, Rowland appealed. Upon appeal an undertaking was given, signed by the defendants, conditioned that the appellants would pay all costs or damages which may be awarded against the appellants on said

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appeal not exceeding \$500 ; and also that if the judgment so appealed from or any part thereof is affirmed or the appeal is dismissed the appellant will pay the sum directed to be paid by the judgment or that part thereof as to which judgment shall be affirmed. The attorney for the plaintiff duly excepted to the sureties and notice of the justification of the sureties was given. March fourth defendants attended for justification of the sureties, and were both sworn before the judge, and while the examination of the defendant Gould was in progress news came of Rowland's death, when the defendants declined to go on or go upon a dead man's bond. Plaintiff's attorney requested Gould to accept the examination and sign it, but he refused and left. The defendant King refused to appear for examination. Plaintiff took no measures to have the examination completed, but moved to dismiss the appeal. In July, 1880, the action was revived against Rowland's administratrix. November 1, 1880, the judgment was affirmed, and a copy of the order of affirmance was duly served on the attorney for the administratrix. Judgment of affirmance, and a copy thereof was served upon the same attorney. Action was then brought against the defendants upon the undertaking. The defendant King moved for a judgment of nonsuit, and also that the court direct the jury to return a verdict for defendant dismissing the complaint. The defendant Gould made the same motion on his own behalf. The motions of the defendants were denied, to which they severally excepted. Whereupon the plaintiff moved that the court direct the jury to find a verdict for \$692.76, which the court did, and to which the defendants severally excepted, and the jury so found. From the judgment entered upon the verdict of the jury, defendants appealed, and the judgment was affirmed at general term, from which the defendants appeal to this court.

N. C. Moak, for appellants.

Fred. M. Littlefield, for respondent.

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TRACY, J. — The question to be determined in this case is whether the sureties to an undertaking given on appeal to the general term of the supreme court or of a superior city court, when excepted to, and they fail or refuse to justify and justification is not waived by the respondent, are nevertheless bound by the conditions of their undertaking. This depends upon the construction to be placed upon sections 1352 and 1335 of the Code. Security is not required to perfect an appeal to the general term from a final judgment rendered in the same court, but such appeal does not stay proceedings upon the judgment, and the party having the judgment may proceed to enforce it as if no appeal had been taken. If the appellant desires to stay the execution of the judgment pending the appeal, section 1352 of the Code requires that he must give the security required to perfect an appeal to the court of appeals. Upon giving such security, the execution of the judgment appealed from is staid, as upon an appeal to the court of appeals, and subject to the same conditions. Section 1335 of the Code provides that it is not necessary that an undertaking upon an appeal to the court of appeals should be approved, but the attorney for the respondent may within ten days after service of a copy of the undertaking except to the sufficiency of the sureties. Within ten days thereafter the sureties, or other sureties in a new undertaking to the same effect, must justify before a judge of the court below or a county judge. If the judge, after examination of the sureties, finds them sufficient, he must indorse his allowance of them upon the undertaking or a copy thereof. The section then declares: "The effect of a failure so to justify and to procure an allowance is the same as if the undertaking had not been given."

The meaning of this language is too obvious to admit of doubt. Failure of the sureties to an undertaking upon an appeal to justify, when excepted to defeats entirely the object and purpose of the undertaking. Where security is required in order to perfect the appeal, the appeal from the judgment

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is not perfected and the party having the judgment may proceed thereon as if no appeal had been taken. Where security is not required to perfect the appeal, but is required to stay the execution of the judgment, the judgment may be enforced pending the appeal as if no undertaking to stay the execution thereof had been given.

So much is clear. The remaining question to be considered is, whether the respondent may insist upon his right to disregard the appeal or the stay of proceedings, as the case may be, because of the failure of the sureties to justify, and at the same time hold the sureties upon their undertaking.

We think not. Upon the service of a notice of appeal with an undertaking, the respondent may accept the undertaking and thereupon it becomes effectual and the sureties will be bound. But he may say, "I will not accept the sureties tendered by the undertaking, except upon condition that they appear before a judge, are examined as to their responsibility, and the judge approves them after such examination." Thereupon the appellant may undertake to meet this condition and give notice of justification of the sureties or he may tender other sureties in a new undertaking to the same effect, who must justify before a judge of the court below or a county judge. If he does neither, then the case stands as if no attempt to give an undertaking had been made. No reason can be suggested why the respondent should be permitted to disregard the undertaking and proceed upon the judgment as if none had been given, and yet have all the advantages that the undertaking was intended to secure. The only object and purpose of the undertaking was to stay the execution of the judgment until the appeal had been heard and determined. The respondent cannot have the dual right to enforce the judgment pending the appeal as if no undertaking had been given, and at the same time treat it as valid security for the payment of the judgment. The undertaking was tendered by the appellant and rejected by the respondent, and never perfected by the appellant. It is unnecessary to determine

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whether or not the exceptant might have waived her exception at any time before the refusal of the surety to justify. No waiver in this case was made or attempted. We have carefully examined the numerous authorities cited by the respondent and none of them are in conflict with the conclusion in this case.

The case of *Decker agt. Anderson* (39 *Barb.*, 346) arose on an undertaking given upon the bringing of an action to recover possession of personal property under the Code. The cases are not analogous. In an undertaking given in an action of replevin, the sureties being approved by the sheriff, he is required to take the property of the defendant, and becomes liable to the defendant therefor in case the sureties fail to justify, if excepted to.

In such a case it would be unreasonable to hold that, after the defendant's property has been taken upon the faith of the undertaking, the sureties could relieve themselves from liability by refusing to justify when excepted to. Besides, the Code does not declare that the effect of a failure to justify is the same as if no undertaking had been given. On the contrary, the effect of a failure to justify is to subject the sheriff to liability to the defendant for the property taken. *Ballard agt. Ballard* (18 *N. Y.*) simply decides that an exception duly taken to sureties on appeal is waived by the failure of the respondent to attend the officer before whom the notice of justification is given, although the sureties also fail to attend. It holds that the party excepting is the actor in the proceeding, and no step is necessary to be taken except upon his requisition.

The question involved in the case of *Gibbons agt. Bernhard* (3 *Bosw.*, 635) was one of pleading. It was there held that a complaint upon an undertaking, executed upon an appeal to the court of appeals, sufficient in other respects, is not demurrable as not stating facts sufficient to constitute a cause of action merely because it omits to aver that the undertaking was accompanied by the affidavits of the sureties that they

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were worth double the sum specified therein. Such affidavit was intended for the protection of the respondent and it was competent for him to waive it. In *Hill agt. Burke* (62 N. Y., 111) the respondent accepted the undertaking and never excepted to the sureties. The only defect the sureties claimed was that they did not originally justify in a sufficiently large amount. *Knapp agt. Anderson* (7 Hun, 295; 71 N. Y., 466) decides nothing except that the discharge of the judgment debtor in bankruptcy did not discharge his sureties. The case of *McSpedon agt. Bouton* (5 Daly, 30) was an action brought upon an undertaking given upon an appeal to the court of appeals. Although no such defense was set up in the answer, proof was given upon the trial that the respondent excepted to the sureties, and that after repeated attendance by the respondents on notice for their justification and their failure to attend and justify, the proceedings for justification were abandoned without formal order, and the appeal proceeded and was regularly heard and disposed of in the court of appeals.

Judge ROBINSON held that the failure of the sureties to justify constituted no defense and cited *Decker agt. Anderson* (39 Barb., 346). But that case, as we have already seen, did not arise upon an undertaking given upon appeal and cannot be considered an authority upon the question now before the court. We think the court was misled by the supposed analogy of this case.

Furthermore the language of the Code under which the undertaking was given in that case is not the same as the present Code. The intent of the legislature to make the effect of a failure to justify and to procure an allowance the same as if an undertaking had not been given is more strongly expressed in the present Code than it was in section 334 of the old Code.

The sureties were not bound and the judgment of the general and special term must be reversed and a new trial granted, costs to abide the event.

All concur.

Babcock agt. Emrich.

SUPREME COURT.

NICHOLAS H. BABCOCK, appellant, agt. JOSEPH EMRICH and
FREDERICK BRITENBURGER, respondents.

Specific performance of contract for the sale of real estate — When will not be enforced — Time, though not usually the essence of such contracts, the parties can always make it so.

Where the party who applies for a specific performance has omitted to execute his part of the contract, by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay or where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance.

Where in an action for specific performance of an agreement to convey land it appeared that the time for performance had been extended by the seller, and on the adjourned day the purchaser requested an adjournment because of inability to find his lawyer, the seller thereupon gave the purchaser time to get his lawyer or procure other counsel, but upon the purchaser's return without a lawyer and his request for another adjournment, the seller tendered the deed and demanded the purchase-money, and where on the evening of the next day the plaintiff called on defendant Emrich (the seller) and offered to perform, and the latter refused to perform:

Held, that by the refusal of the purchaser to perform when the tender was made the contract was rescinded, and that this action cannot be maintained.

The court will take judicial notice that lawyers are not so scarce in the city of New York that one cannot be found to attend to such a matter in the course of several hours.

First Department, General Term, January, 1883.

Before DAVIS, P. J., DANIELS and DWIGHT, JJ.

APPEAL from a judgment rendered by justice BEACH at special term, March, 1880, dismissing complaint, with costs. The following is the opinion:

BEACH, J. — This bill is filled to enforce a specific performance by the defendant Emrich of a contract with the

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plaintiff for the sale of real estate situate in the city of New York. The agreement is dated March 31, 1879, and by its terms the price was to be paid and title given June 2, 1879, at two o'clock, P. M., at a place specified. At that date, the proceedings seem to have been adjourned, at plaintiff's request, to June fifth, the same hour. The plaintiff's agent then attended, requesting a further delay, on account of inability to procure the presence of his attorney. This request was declined, though opportunity was given to obtain counsel. The undertaking in that behalf having been unsuccessful, the attorney for the defendant Emrich then made a tender of a deed presumably conforming to the contract. The plaintiff's agent objected to it, only upon the ground of his attorney's absence, and refused to have anything to do with the deed for that cause. No tender or offer to perform was then made on plaintiff's behalf. The defendant subsequently declined to convey, because of the default. I think this case falls within the principle of *Selleck agt. Tallman*, decided by me in common pleas, equity term, June 1879. In the examination now made, I find no reason to change the views there expressed.

In *Benedict agt. Lynch* (1 *Johns Ch.*, 369), the learned chancellor said: It may be laid down as an acknowledged rule in courts of equity, that when the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for the delay, or when there is nothing in the acts or conduct of the other party, that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule seems to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. I can conceive of no equitable principle permitting the founding of an equity upon one's own neglect. From March thirty-first to June fifth would seem to have given the plaintiff ample time for inquiry and preparation. Nothing appears of his action between June second and fifth, the time

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granted by the adjournment, indicating the eagerness and activity required by the familiar rule (*Duffy agt. O'Donovan*, 42 N. Y., 223; *Hubbel agt. Von Schoening*, 49 *id.*, 326). It will be difficult to prescribe a limit beyond which parties may not delay performance and then seek aid in this court, unless the time stipulated in the agreement is adhered to, save in cases of inevitable accident or other exceptionally meritorious excuses. In *Lloyd agt. Collett* (4 Bro., 409), it is said: "There was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed." In the city of New York, where changes in the value of real estate are oftentimes marked and frequent, a contract of sale of realty providing for the execution and delivery of a deed on receiving payment at the time and in manner specified, makes time of the essence of the agreement (*Hepburn agt. Auld*, 5 Cranch, 262; *Goldsmith agt. Guild*, 10 Allen, 139). The later tendency of this court has been to hold that time is material, and in many cases of the essence of the contract. While under some circumstances, as specified in *Duffy agt. O'Donovan*, and *Hubbell agt. Von Schoening* (*supra*), the court will relieve from default, I am unable to find any, warranting such action in this case.

Judgment is directed for the defendants.

Henry E. Tremain, counsel for plaintiff.

S. Untermeyer, counsel for Emrich.

Armour C. Anderson, counsel for Breitenburger.

DAVIS, P. J.—This action was brought to compel the specific performance of a contract for the sale and conveyance of certain real estate in the city of New York. The contract of sale was made March 31, 1879. No part of the consideration was paid. By the terms of the contract the title was to be passed and the consideration paid on the 2d day of June,

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1879, at 2 o'clock P. M., at the office of John S. Cram, Esq., No. 65 Wall street.

The vendor Emrich had a deed of the premises prepared and ready for delivery at the time and place named in the contract, and the deed together with a statement of an amount to be paid were handed to the plaintiff's attorney. It was objected by him that the amount charged for searches by the loan commissioners (through whom the defendant Emrich received title) was larger than they expected, and he requested an adjournment that he might examine it. The request was acceded to and the completion of the contract was adjourned to June fifth, at the same hour and place.

On that day the parties appeared at the time and place named; the plaintiff, by his agent, who had conducted all the negotiations, and the plaintiff requested another adjournment on account of the absence of his attorney. Emrich refused to consent to another adjournment, but time was given to the plaintiff to get his attorney or to procure other counsel. The plaintiff then went to his attorney who was in his office, but declined to leave his office alone. His clerk being ill the plaintiff's agent then applied to another attorney who was busy and could not attend, and after some hours he returned to the office of Mr. Cram, where the defendant Emrich had been waiting. Emrich's attorney also sent a note to plaintiff's attorney asking him to come, but he declined, and sent a note in reply asking four days' further time. On the return of plaintiff's agent he refused to go on with the completion of the contract because he had no lawyer present. No other reason was assigned. The defendant Emrich then made a formal tender of a deed of the property and requested performance by the plaintiff on his part. In the evening of the next day the plaintiff went to Mr. Emrich's house and presented a deed for execution, declared his readiness to perform the contract. Emrich refused to perform on the ground of plaintiff's failure, &c. On the 17th of January 1880 (seven months afterwards), the plaintiff commenced this action pray-

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ing specific performance or damages for inability to perform. On the nineteenth of June, Emrich conveyed a portion of the premises to the defendant Breitenburger, who took possession and made some improvements. Some evidence was given tending to show that Breitenburger bought with express or implied notice of plaintiff's contract.

The court at special term dismissed the complaint and held that the contract was rescinded by what had taken place on the fifth of June, and that the defendant Emrich was not bound afterwards to convey.

Nothing had ever been paid upon the contract by plaintiff, so that there is no question of the forfeiture of moneys paid on part performance; in this case the parties had stipulated a day, place and hour of performance. The defendant Emrich was at that time and place, ready to perform; his deed was presented to the plaintiff and his attorney, and his statement of the sum to be paid under the contract. But one objection was made, and that related to an amount for searches charged by the loan commissioners, of whom the title had been purchased by Emrich, and time was requested to make an examination in relation to those searches. For that purpose an adjournment was had for three days to and at the time and place moved. The defendant Emrich appeared; his deed was already prepared and had been examined; he was ready to go on and complete the contract, as required by the contract. The plaintiff was not ready solely because his attorney was not there; he was given several hours to get his attorney, or some other lawyer, but he failed to get anyone and then returned and declined to go on and complete the contract solely for the want of a lawyer. The defendant then made a formal tender and demand of performance and (so far as that has the effect) did everything necessary to relieve himself from further obligation on the contract.

We think the special term was right in holding that Emrich was under no further obligation to plaintiff, and that the case is not one in which equity ought to intervene and compel a

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performance. Time is not usually of the essence of such contracts but the parties can always make it so. In this case they had done it by an express stipulation fixing place, day and hour, and by an adjournment to another day and hour at the same place, to give the purchaser time to examine a specific objection, to wit: the charge for certain searches which he was to pay. The defendant was again ready and willing to perform at the specified time and place; the plaintiff was not ready not because he had not satisfied himself that the charges were not correct, but solely because his lawyer did not chose to leave his office long enough to consummate the transaction. Time was then given sufficient to get his attorney or some other lawyer, which the plaintiff after several hours absence failed to do. Written notice was sent to the attorney who had before appeared, and he refused to come and only answered by requesting a four days' adjournment. The court can take judicial notice that lawyers are not so scarce in the city of New York that one cannot be found to attend to such a matter as this was, in the course of several hours, and it is not surprising that the defendant Emrich thought that his rights were being trifled with and elected to make tender and demand of performance and terminate the contract. The time of business men is too valuable to justify us in saying that a vendee in so small a transaction as was this, can at his pleasure and without better reasons than were given in this case, require repeated attendances and delays in the performance of contracts of this character. Here there was no deception practiced, no mistake or misapprehension as to time and place, no effort to forfeit money already paid, but at most a conclusion after reasonable courtesies had been exhausted not to extend any more, and that, under the circumstances, was not an unreasonable exercise of the defendant's just discretion and regard for his own rights.

The case suggests, and the cross-examination of the witness Babcock tends to show, that the plaintiff was not ready to make his payments, and had not sufficient money to do that

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on either of the days; but however that may really have been, we are of opinion Emrich had a right, both legal and equitable, to take and stand upon the position he took after the plaintiff's agent returned and declined to go on with the performance of the contract.

Each case of this kind is to be judged by its own circumstances; and as the court said in *Hubbell agt. Van Schoening* (49 *N. Y.*, 331): "A party may not trifle with his contracts and still ask the aid of a court of equity. He who seeks this species of relief must not have been guilty of negligence, but must show that he has been ready, desirous, prompt and eager" (2 *Story*, sec. 776; 1 *Story on Vendors*, 298, 410; *Benedict agt. Lynch*, 1 *Johns. Ch. R.*, 370).

The case of *Sillick agt. Tallman* (87 *N. Y.*, 106) is so different in its facts that it really has no bearing upon the question before us, and the opinion of the court in the *Merchants' Bank agt. Thompson* (55 *N. Y.*, 12) justifies the views we have taken. Under the circumstances we think there was unreasonable delay in bringing the suit, but that was not a point on which the case was disposed of below.

It is not necessary to make any examination of the questions raised either for or against the defendant Breitenburger, because if the judgment is conclusive dismissing the complaint as to the defendant Emrich, there is nothing left for a claim of relief against Breitenburger.

The judgment should therefore be affirmed, with costs; but one bill only can be taxed.

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SUPREME COURT.

CHRISTIAN BACHMANN agt. THE NEW YORKER DEUTSCHER ARBITER BUND.

Benefit societies — Expulsion of member — Laches — When appeal only remedy — Res adjudicata — When judgments at law are conclusive in equity — When courts of equity have no revisory powers over actions of benefit societies — Presumptions in favor of fairness of members — Effect of delay in applying for restoration to membership after expulsion.

When a party, formerly a member of a benefit society, sleeps upon his alleged rights to restoration as a member for an unusual length of time, such seeming acquiescence in his expulsion is of itself unfavorable to his application for restoration.

The plaintiff brought an action in a district court in this city for the recovery of weekly allowances or benefit money for a period before his expulsion, and beyond it, and the defendant set up, among other defenses to his right to recover, that the plaintiff had been expelled:

Held, that by including in his claim for weekly allowances a period beyond his expulsion, and by submitting the question of its regularity to the decision of the justice, the plaintiff's only remaining remedy was by an appeal.

Where, in such a case, a party submits the question of his expulsion to the justice, even though the justice has no inherent equity jurisdiction, he is concluded by his determination.

When a matter is regularly determined, in whatever form, by a competent tribunal, the same is not open to inquiry in any other proceeding between the same parties. A judgment at law is conclusive in equity upon the same subject between the same parties.

Courts of equity have no revisory powers over benefit societies who are regulated by their own laws and rules, which are conclusive upon their members, provided they are conducted fairly according to their rules; and when the latter fact is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject should be closed.

Every presumption is in favor of the fairness of the expulsion of a member from such a society, because the interests of the fellow-members are naturally that the rights of each individual member should be sedulously guarded, as the same measure they apply to others may in the end be administered to themselves.

Special Term, December, 1882.

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THE complaint alleged that the defendants are a corporation and its objects are to assist its members and their families in case of sickness or death. That up to the 16th day of July, 1875, the plaintiff was a member, and on that day he was illegally and wrongfully expelled from the society, and since that time he has been refused permission to participate in the privileges and rights of such membership. That since his expulsion he has been willing to perform his duties as a member and has tendered performance thereof, which was refused. That since his expulsion he has been sick, and on application was refused benefit moneys to which he is entitled under the by-laws of the society. Wherefore he prayed that he be reinstated as a member as of the day when he was expelled, and for the sum of \$1,000 damages. The answer interposed, among other defenses, was the expulsion of the plaintiff on the 16th day of July, 1875, and that such expulsion had been tried, submitted and decided upon the merits as legal and regular by a justice of one of the district courts of the city of New York.

Wehle & Jordan, for the plaintiff.

Henry Wehle and *Charles Goldzier*, of counsel, made and argued the following points:

I. The expulsion of the plaintiff from the society was without cause or provocation. The only ground of expulsion authorized in the constitution is drawing sick relief without being entitled to the same. The proceeding of the society in attempting to punish by expulsion of a member, because he has invoked the law against the society, was extremely inequitable, and unless the court is by some imperative rule of law to sustain the same, the proceeding should be set aside, so that this and other societies may understand that they are not above the law. The courts have heretofore recognized the necessity of squelching the pretensions of these societies (*Lloyd agt. Loring*, 6 Ves., 733, cited with approval in *Austin agt. Searing*, 16 N. Y., 119).

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II. The alleged immorality, which is also one of the grounds for the expulsion, is not cause for expulsion under the constitution; but even if this were otherwise, the only "immorality" claimed consisted in the plaintiff calling the members of the society frauds and humbugs. The calling of names is not immorality in any sense, and the action of the society in asserting this as one of the grounds of expulsion is of itself reason sufficient to set the same aside as having been made without authority of the society's constitution (*Commonwealth agt. German Society*, 15 Pa., 251).

III. Plaintiff's expulsion was clearly illegal, the charges were not served upon him and no notice given him to appear and defend. The expulsion is void for want of jurisdiction, not only on the ground that the charges embraced matters not authorized as grounds of expulsion by the constitution, but because no opportunity to defend was given to plaintiff (*People agt. St. Francis' Society*, 24 How., 216).

IV. To constitute a bar the former adjudication must have been upon the same cause of action. The mere fact that the same transactions which give rise to this cause of action were involved in the former is not sufficient (*Stowell agt. Chamberlain*, 60 N. Y., 272). The action in the district court was on contract; the action in this court is to remedy an independent wrong, viz., the unlawful expulsion (*Fisher agt. Hope Life Insurance Co.*, 69 N. Y., 161).

V. The party who asserts an estoppel by judgment must prove it beyond a doubt (*Remington agt. O'Dougherty*, 81 N. Y., 474). It is a well established rule that nothing will be implied in favor of the jurisdiction of a minor court; and this court will at all events refuse so to imply where an estoppel is sought to be predicated upon such implication (*Adkins agt. Brewer*, 3 Cow., 206; *Bloom agt. Burdick*, 1 Hill., 130).

VI. The reinstatement of the plaintiff should be decreed, and since a court of equity will exercise its jurisdiction for the purpose of doing complete justice between the parties,

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damages should be awarded (*Bemer agt. Drew*, 39 *How.*, 466; *Rathbone agt. Warren*, 10 *Johns.*, 587; *Days agt. Taylor*, 238).

J. C. Julius Langbein, for defendants, made and argued the following points :

I. The question of plaintiff's expulsion and its legality, was tried before justice DINKEL, and that justice so decided after a trial upon the merits. His judgment is therefore *res adjudicata* upon that question, and an estoppel by way of record to the plaintiff's claim in the action. The force of a judgment as *res adjudicata* cannot be destroyed or impaired by showing that it was clearly erroneous and ought not to have been rendered (*Freeman on Judgments*, 273; *Case agt. Beuregard*, 101 *U. S.*, 688; *State agt. Rainsberg*, 43 *Md.*, 325; *Roundtree agt. Walker*, 46 *Texas*, 300; *Lineham agt. Hathway*, 54 *Cal.*, 251). A verdict in a former suit is conclusive although rendered upon a mistaken view of the law (*Morgan agt. Plumb*, 9 *Wend.*, 287). It is thoroughly well settled that the mode in which the question of *res adjudicata* is brought is immaterial, if it be actually decided (*Clemens agt. Clemens*, 37 *N. Y.*, 72; 2 *Smith's Leading Cases*, 78, and *authorities there cited*). A judgment is conclusive not only as to matters actually determined, but as to every other matter which the parties might have litigated, and have had decided as incident to the subject-matter of the litigation, or coming within the legitimate purview of the original action, both as to matters of claim and defense (*Sampson agt. Hart*, 14 *Johns.* 63; *Southgate agt. Montgomery*, 1 *Paige Ch.*, 41; *Haire agt. Baker*, 5 *N. Y.*, 357; *Davis agt. Talcott*, 12 *N. Y.*, 184). It is no answer to the defense of a former recovery that the forms of actions in both suits are not the same (*Miller agt. Maurice*, 6 *Hill.*, 114). The rule is that one shall not be vexed twice for one and the same cause, and that an allegation of record, upon which issue has been taken and found, is between the parties taking it and their privies conclusive, so as to estop the parties from again litigating the fact once so

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found (*Stowell* agt. *Chamberlain*, 60 *N. Y.*, 276). When the authorities say that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, the expression must be limited applicable to such matters only which might have been used as a defense in that action against an adverse claim therein; such matters, as if now considered, would involve an inquiry into the merits of the former judgment (*Whitcomb* agt. *Williams*, 4 *Pick.*, 228; *King* agt. *Chase*, 15 *N. H.*, 13; *Malloney* agt. *Horan*, 49 *N. Y.*, 116).

II. By going to trial upon the question of the legality and regularity of his expulsion, and try the same upon the merits, the plaintiff is estopped, and cannot now litigate that question in another tribunal. If the claim is within the issue and is passed upon, it creates a former adjudication (*Masten* agt. *Olcott*, 24 *Hun*, 587). When the jurisdiction of a court of limited authority depends upon a fact which must be ascertained by that court, and such fact appears and is stated in the record of its proceedings, a party to such proceedings, who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards, in a collateral action against his adversary in those proceedings, impeach the record and show the jurisdictional fact therein stated to be untrue (*Dyckman* agt. *The Mayor*, 5 *N. Y.*, 438). A defense before a justice on the ground of usury was held to be a bar to relief in equity on the same ground (*Cave* agt. *Davis*, 5 *Monroe*, 292; *Phillips on Evidence* [vol. 2], 98).

III. The plaintiff was properly and legally expelled under the constitution and by-laws of defendant's society. His expulsion was based upon three grounds which are amply sustained by the evidence: 1st. For non-payment of dues. 2d. For performing manual labor while reporting sick and unable to work. 3d. For indulging in immoral conduct, and calling the society swindlers, thieves and humbuggers. When the plaintiff became a member of the defendant's society he became bound by its constitution and by-laws (*Sassenscheit* agt. *The Fresco*

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Painters' Benevolent and Protective Union, City Court Reports [vol. 1], p. 8; *White* agt. *Brownell*, 2 *Daly*, 329; *Same case*, 3 *Abb. Pr. R. [N.S.]*, 318 and 4 *Abb. Pr. R. [N.S.]*, 162; *Olery* agt. *Brown*, 51 *How. Pr. R.*, 92). A member of one of these societies cannot be sick under its by-laws and at the same time work. If he desires the benefit of the sick or relief fund, he must stay in bed, and if he shams sickness and is discovered, he is liable to expulsion (*Kelly* agt. *Ancient Order of Hibernians*, 9 *Daly*, 289).

IV. The evidence, both oral and documentary, proves that the plaintiff received notice that he would be expelled, and to show cause why this should not be done, it is conceded that if the evidence does not prove notice on the plaintiff, that his expulsion was illegal and the court should restore him to membership. Members of charitable and benevolent societies cannot be expelled therefrom without notice and an opportunity to be heard in their defense (*Schmitt* agt. *The St. Franciscans' Benevolent Society*, 24 *How.*, 216).

V. Upon the law and evidence, as well as upon the merits, there should be a judgment for the society, with costs, and thus this plaintiff would be shown that he cannot remain a leech upon the defendant's society of which he was once a member, but who lost that right and the benefits and privileges under it by his own fraudulent acts.

VAN VORST, J. — The plaintiff asks to be restored to his membership in the defendant's society, from which he insists he has been illegally expelled.

The expulsion took place in July, 1875, more than six years before the commencement of this action.

If the plaintiff has any rights in the premises, he seems to have slept an unusually long time before invoking judicial aid for their enforcement and for his restoration, through a direct proceeding. Such seeming acquiescence in his expulsion is of itself unfavorable to plaintiff's present action.

If any wrong or injustice has been done him, through the

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action of his associates, it is reasonable to suppose that he would have promptly moved in the direction of being reinstated to his lost rights and privileges. It appears, however, that in the year 1878 the plaintiff commenced an action in the district court of the fourth judicial district, before justice DINKEL, for the recovery of a weekly allowance from the defendant's society. His claim embraced a period before his alleged expulsion, and extending beyond it. Among the defenses interposed to his right to recovery, was that of the plaintiff's expulsion in July, 1875. The justice rendered a judgment in the plaintiff's favor for weekly allowances up to the date of his expulsion, and rejected his claim after that period. The record of the plaintiff's expulsion was given in evidence before the justice, and other evidence was also given touching the regularity of the expulsion under the rules of the society. Justice DINKEL, who was examined as a witness upon the trial of this action, testified that the subject, as to whether the plaintiff was properly expelled, was perhaps the only question that was tried before him, and that he decided that the lodge had complied with the by-laws in the proceedings for the expulsion. The plaintiff could doubtless have avoided a decision of his case in this particular by justice DINKEL, had he limited his claim before him up to the time of the alleged expulsion, and could then have properly invoked the aid of a court of equity to annul the record of his expulsion, if he had sufficient cause therefor, but by including in his claim for weekly allowances a period beyond his expulsion, and by submitting the question of its regularity to the decision of the justice, his only remaining remedy is by an appeal from the judgment of justice DINKEL.

The defendant would have been concluded by the judgment, if the decision had been adverse to it, as the plaintiff is now held to be. Upon the application of the principle that when a matter is regularly determined, in whatever form, by a competent tribunal, the same is not open to inquiry in any other proceeding between the same parties, the plaintiff's complaint

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must be dismissed. It is idle to say that the former adjudication was had in a district court; the parties submitted the subject to the decision of the judge, and are concluded by his determination. Nor is it in point to urge that the present is an action substantially in equity, and that the former adjudications was had in a law court. A judgment at law is conclusive in equity upon the same subject between the same parties. Proceedings for the expulsion of members from bodies, constituted as the defendant is, are commonly regulated by their own laws and rules, which are conclusive upon members, and the courts of equity have no revisory powers over such adjudications, provided they are conducted fairly according to the rules of the society, and when the latter fact is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject should be closed, otherwise the court would be overwhelmed with applications of this character.

And in general it may be said that every presumption is in favor of the fairness of the expulsion of a member, in a proceeding instituted and carried on by fellow members, whose interests would naturally be that the rights of each individual should be sedulously guarded and conserved, as the same measure they apply to others may in the end be administered to themselves. Upon the sole ground, however, that the question has been determined by justice DINKEL, the plaintiff's complaint is dismissed, with costs.

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SUPREME COURT.

WILLIAMSON agt. WILLIAMSON.

Summons — Service by publication — Papers upon which order for, may be made — Code of Civil Procedure, sections 488, 489.

An order for the publication of a summons must be founded upon a verified complaint, showing sufficient cause of action against the defendant to be served.

Where a complaint was verified before a commissioner for the state of New York residing in Philadelphia, and no certificate of the secretary of state of the state of New York, certifying to the genuineness and official signature of the commissioner, was attached to the alleged verification:

Held, that such a complaint is not a verified complaint, and the justice who made the order for publication never acquired any jurisdiction to make this order.

Special Term, February, 1883.

LAWRENCE, J.—This is an action to obtain a judgment for an absolute divorce, on the ground of the adultery of the defendant. The plaintiff resides in the city of New York, and alleges in his affidavit that the defendant “is at present living with her infant child in the said city of Baltimore and state of Maryland; that for the reason that defendant has not been within the state of New York for a period long prior to the commencement of this action, deponent has been unable to cause personal service of the summons herein to be made on defendant,” &c. Upon the complaint and affidavit of the plaintiff an order was made on the 5th day of September, 1882, for the service of the summons upon the defendant by publication, and the defendant having made default, the cause was referred to a referee, who reported in favor of the plaintiff; but said report has not been confirmed. The defendant now moves to vacate and set aside the service of the summons and order of publication, for the reason that the complaint presented to the justice granting the order of pub-

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lication was not a verified complaint, no certificate of the secretary of state of the state of New York, certifying to the genuineness and official signature of the commissioner of the state of New York residing in Philadelphia, where the complaint purports to have been verified, being attached to the alleged verification of the complaint. Also, on the ground that the affidavit and order for publication failed to specify defendant's precise address in Baltimore, to which the summons should have been mailed. There is also in the notice of motion a general prayer that in case the application be denied on the above grounds, the default of the defendant be opened, and that she be allowed to come in and defend the action. In this case the order for the publication of the summons was founded upon a complaint purporting to have been verified before Lewin W. Barringer, a commissioner for the state of New York, resident in Philadelphia, Pennsylvania. By section 439 of the Code of Civil Procedure, the order for the publication of the summons must be founded upon a verified complaint showing sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by section 438. It is claimed that in this case no verified complaint was presented to the learned justice who granted the order for publication, for the reason that there was not attached to the certificate of the commissioner in Philadelphia a certificate of the Secretary of State certifying that such commissioner was duly authorized to administer such oath or affirmation, &c. I am inclined to the opinion that this objection is well taken, for the reason that the statutes provide that when any oath or affirmation shall be taken before any commissioner appointed in another state for this state, before the same shall be entitled to be used or read in evidence there shall be subjoined or affixed to the certificate signed and sealed by such commissioner a certificate under the hand and official seal of the secretary of state of this state, certifying that such commissioner was duly authorized to administer such oath or affirmation at the time his certifi-

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cate bears date, and that the secretary is acquainted with the handwriting of such commissioner or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and that he believes the signature and the impression of the seal of said certificate to be genuine (*See 3 R. S. [7th ed.], 2231, sec. 2; Id., 2226, sec. 4*). Inasmuch as the statute requires that before any deed or other instrument, oath or affidavit, patent or record, shall be read in evidence, the certificate of the secretary of state required by the statute shall be attached to the certificate of the commissioner residing in the sister state, it seems to me conclusively to follow that there was no evidence before the learned justice who granted the order of publication in this case that there was a verified complaint showing a sufficient or any cause of action against the defendant. And yet, as we have already seen, section 489 of the Code requires that the order must be founded upon a verified complaint showing such sufficient cause of action. If the view which I take is correct, the learned justice who made the order for the publication of the summons never acquired any jurisdiction to make the order, the essential prerequisite to such jurisdiction—to wit, a verified complaint—being wanting in the case presented to him.

SUPREME COURT.

DANIEL WEBSTER ARNOLD, appellant, agt. ISAAC J. OLIVER,
defendant.

Bankruptcy—When judgment discharged by proceedings in — Section 1366 of Code imperative in its nature — Defeated party may apply for rehearing of motion before judge who decided it, either on same or new papers.

Judgment was recovered against the defendant on March 10, 1876, on a debt contracted prior to February 26, 1876, upon which date defendant was adjudicated a bankrupt. On July 31, 1876, defendant obtained his discharge in bankruptcy:

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Held, first. That the judgment was not such a merger of the indebtedness as to create a new debt, and that the debt as well as the judgment were necessarily discharged by the bankruptcy proceedings.

Second. That section 1268 of the Code of Civil Procedure is imperative and absolutely entitles defendant to an order canceling the judgment from the docket.

Third. That a rehearing of a motion may be had before a court held by the judge who heard the original motion, either upon the original papers or upon new papers.

First Department, General Term, January, 1883.

Before BRADY, P. J., and DANIELS, J.

APPEALS from two orders, one allowing the defendant to reargue a motion previously made and decided, or to renew such motion upon further papers, and the other granting the motion allowed to be so made, and canceling the judgment affected by it.

George H. Forster, for appellant.

Samuel Greenbaum, for respondent.

DANIELS, J. — The judgment which was directed to be canceled and discharged by the final order was recovered by the plaintiff against the defendant on the 10th of March, 1876. The indebtedness was contracted before the 26th of February, 1876, on which day the defendant filed his petition for his adjudication in bankruptcy. Under the proceedings commenced he was adjudged a bankrupt and, on the 31st day of July, 1876, discharged from all debts existing against him on the twenty-sixth day of February of that year. As the judgment, according to the decision which was made in *Monroe agt. Upton* (50 N. Y., 593), was not such a merger of the indebtedness as to create a new debt, the debt as well as the judgment were necessarily discharged by the result of these proceedings under the bankrupt law. And that, under the authority of section 1268 of the Code of Civil Procedure, entitled the defendant to an order discharging him from the

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payment of the judgment and for the cancellation and discharge of the docket thereof. This provision is imperative in its nature, and absolutely entitled the defendant to such relief. It has been urged however, in support of the appeal, that he deprived himself of this right by the result of certain applications made by him preceding the making of the final order. These were applications to be relieved from the judgment, and, with one exception, not precisely such as were provided for by this section of the Code.

The hearing of the first application, which seems to have been in form correct, was denied, for the reason that the remedy was considered to be a motion for an injunction, or for leave to open the judgment and interpose the defense of the discharge in bankruptcy. And such a motion, by the terms of the order, was afterwards permitted to be made. When that came on to be heard, the defendant was considered not to be entitled to that relief, and the application was denied. And that denial was warranted by the change made in the practice by this section of the Code and a similar statutory provision preceding it. A further application was thereupon made for the order provided for by this section of the Code, but that was denied, probably because of the impropriety of bringing it on before a justice other than the one hearing the original application. After that denial an application was made before the justice hearing the first motion. That resulted in one of the orders from which the appeal has been taken allowing the motion to be reheard. The application was afterwards reheard upon the original and further papers, and an order was finally made discharging and canceling the judgment, and from that order the principal appeal now before the court was taken.

It has been urged that these proceedings, especially those resulting in the two orders from which the appeals have been taken, were improper and unauthorized, and that the only remedy which the defendant had was to appeal from the order made upon the hearing of the first of these applications.

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But the rule of practice, as it is indicated and sustained by the authorities, does not warrant this position. For where a motion has been heard and improperly decided against the defeated party, he may apply for a rehearing, provided he does so before a court held by the judge making the decision. And that may be done either upon the original papers or those with further papers supplied and served for that purpose (*White agt. Monroe*, 33 *Barb.*, 561; *Smith agt. Spaulding*, 30 *How.*, 339; *Belmont agt. Erie R. R. Co.*, 52 *Barb.*, 637).

It was entirely proper under this rule, where a right created by law had been denied to the defendant, under what appears to have been a misapprehension, that an application should be made to the court by whose order the right had been denied for a further hearing of the application. The court had ample authority to entertain such a motion as it did, and to rehear the case in order that the defendant should have the benefit of the provision of the statute which had been so clearly made in his favor. No such delay intervened in making this application as should deprive the defendant of this order to which this section of the Code declared him to be entitled. For the section itself provides that the application may be made at any time after two years had elapsed since the bankrupt was discharged from his debts. And he was literally within the authority when his first motion was heard and decided on February 2, 1882. Since that time his repeated applications have been characterized with diligence, for he has been a constant applicant for that relief which the statute declared him entitled to receive. The order providing for a rehearing before the same court of the application originally made and decided against him was, under the circumstances appearing, an entirely proper one, and that by which he was discharged from the judgment, and its cancellation directed had the express authority of this section of the Code for its support.

The orders from which the appeals have been taken should be affirmed, with the usual costs and disbursements.

BRADY, J., concurs.

Wylie agt. Northampton National Bank.

U. S. CIRCUIT COURT.

FANNY D. WYLIE agt. THE NORTHAMPTON NATIONAL BANK.

National banks — Their liability for stolen bonds belonging to special depositors — Negligence — Proof necessary to establish.

A national bank cannot enter into a valid contract to undertake the business of the recovery of the stolen property of special depositors.

The directors might be liable individually.

To recover against a bank for bonds left with the bank as a gratis bailment, something more is needed than the mere fact that they were stolen from the bank.

A complaint claiming that the bank recovered \$1,500,000 back from the thieves, or an agreement that in consideration of such recovery the bank allowed the thieves to retain the property of plaintiff and other special depositors, states a valid cause of action, but here there is no proof sufficient to go to the jury as to this branch of this cause of action.

In such an action the plaintiff will be held to proof of the allegations made, and will not be allowed to rest on proof of other negligence.

Southern District of New York, January, 1883.

THE Northampton National Bank was robbed of the property of itself and of various special depositors, including the plaintiff, to the amount of about \$1,600,000. Five years later all but \$130,000 of the property was recovered from the thieves. Among the property not recovered were bonds to the value of \$10,180 belonging to the plaintiff. The other facts appear in the statements of counsel and the opinion of the court.

W. G. Peckham and E. W. Tyler, for defendant, moved the court at the close of the plaintiff's evidence to direct a verdict for the defendant. As to the first cause of action, negligence in the keeping of a gratis deposit, the mere fact that the goods were stolen does not establish negligence under the American decisions (*Comp agt. Carlisle Bank*, 94 Penn., 409; *Foster agt. Essex Bank*, 17 Mass., 479); and proof of gross negligence was required even in *National Bank agt.*

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Graham (100 U. S., 699). Furthermore, plaintiff may not plead a tort that amounts to a crime and attempt to recover on proof of a trifling negligence not set out in the complaint, viz., the not sending of notices of the robbery to Frankfort-on-the-Main, or the attempted proof that a director wrongfully recovered his own special deposit (*Dudly* agt. *Scranton*, 57 N. Y., 424; *Parker* agt. *The Rens. and Saratoga R. R. Co.*, 16 Barb., 316; *Ross* agt. *Mather*, 51 N. Y., 108; *Delevan* agt. *Simonson*, 35 Super. Ct., 248). The directors and officers, all of them, acting as individuals cannot bind the bank to such an undertaking (to recover another's stolen property) as that in the complaint. They must at least have acted as a board in an official corporate capacity (*Alleghany Co. Workhouse* agt. *Morse*, 95 Penn., 408; *East Anglian R. R. Co.* agt. *Eastern Co.*, 21 L. J. [N. S.], 23; *Chem. Nat. Bank* agt. *Kolmer*, 8 Daly, 532). Even in the *One Hundred United States* case the court says: "We do not mean, however, to say it (the bank) could convert itself into a pawnbroker's shop." Such an undertaking as this a national bank has no charter or power to undertake (*Judge WHEELER*, in *Wylie* agt. *Nat. Bank of Brattleboro*, 47 Vt., 550, and *Whitney* agt. *Same*, 50 Vt.).

George H. Adams and *Artemas H. Holmes*, for plaintiff, oppose the motion on the ground that in New York practice the proof of the negligence as to notices sent abroad and as to acts of the director H. are admissible and sufficient, and that proof of *dolus* is not essential in an action for negligence, citing *Wharton on Negligence*; *National Bank* agt. *Graham* (100 U. S., 699), and *Abbott's New York Forms of Pleading*. The director H. and the vice-president promised to undertake the recovery of the plaintiff's property. Their action was approved by the other officers. The bank made similar agreements with the other special depositors, and in fact with all the depositors, at a meeting.

WHEELER, J. — The constitution gives the right to trial by jury; not trial by the court in the presence of the jury, but

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trial by jury in fact. At the same time it is the duty of the court to decide whether there is any evidence to go to the jury tending to prove the facts. If there is not, why then the court is not in duty bound and has no right to submit to the jury what the facts may be in order to make out a case. It requires proof, and proof of facts, and proof of facts tending to establish the ground of recovery.

The complaint goes for this: negligence about keeping the bonds in the first place. Then it goes on and alleges an agreement by the bank to act for the plaintiff in recovering her bonds from the thieves or persons who had them, and for a breach of that agreement—that is, neglect in not recovering the bonds for her—and specifies as a ground of recovery in the complaint that in recovering their own property they traded away hers. That they agreed with the robbers that if they would let them have what they did return they might keep plaintiff's bonds. Of course if they could make that out they would have a good case; but the evidence not only does not show that the bank made that agreement with the robbers, but it shows they did not. The direct evidence upon the point of what the arrangement was by which the bonds were finally recovered shows that the bank did not agree to that. The witness on that point so testifies. The evidence shows that that was not a part of the agreement, so that part of the case is not made out. Now then as to the agreement to act for her. In the first place I do not think that the stockholders of a national bank could be bound by an agreement by their president or cashier or directors, or all of them together, to undertake the job of hunting up any stolen bonds, as a bank. It is no part of the purpose for which a bank is chartered; it is no part of the business of the bank. I do not think the bank would be bound by any such agreement. But suppose they could. Now this complaint says that they agreed to act for her in negotiating for the recovery of these bonds. That would mean that they were bound to do the best they could in making those negotiations. The matter of

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advertising the bonds had all gone by when the agreement was made. Now I think there is evidence sufficient to go to the jury that the plaintiff was fairly given to understand by the officers of the bank that they would act for her. They had lost their own securities and lost the securities of a great many other depositors and they were trying to get them all back. I think they gave her to understand that in trying to get theirs they would try to get hers or would do the best they could. Now if they were bound by that agreement and did do as well as they could reasonably, they would not be liable. So we shall have to look at this evidence and see if it shows any act, anything which we could see they did that they ought not to have done, or did not do which they ought to have done. Now I am not able to see, after looking it all over, anything that they could do that they did not do. Now here was Mr. Hinckley, a depositor who had \$25,000, I believe, of bonds of a particular class, which he owned, which he got track of, which he negotiated for, and part of which he got back. Now they say the bank ought not to have let him get back his, without getting back hers. They could not hinder him any more than they could her. The most they could do would be to act on any information that they got through him that the bonds were here, here in New York. They were all the while fishing for information about that.

There is nothing to show that they had anything definite that they could act upon or that they didn't do as well as they could. When they came to a final negotiation by which they got \$1,500,000, her bonds were not here; they were not with those they got. They did not agree that theirs should be given up and hers should be lost. Her bonds were on the other side of the water; they were not here at all. They were not dealing with those who had them. Now, I could not say to the jury that here is anything that I submit to you as proof of neglect on the part of this bank as a bank. If I were to say that we would hear the defense, and go along with a large number of witnesses, no matter what they should testify to, it

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would come to this in the end. The plaintiff declared for a good case. If she could prove her complaint, she would have an excellent case. If she could prove that this bank, having got track of these bonds, made an agreement with the robbers and thieves that they might keep hers if they would give up theirs, that would be a good case anywhere. That is not proved; it is disproved. They didn't do any such thing; they did not trade her out; they didn't throw her stock overboard to get theirs. And notwithstanding the plaintiff's misfortune—which all of us, of course, regret—I don't think as to that part of the case that there is enough of it that tends to prove anything done or not done which ought to go to the jury; and I think at the bottom of all of it that the bank as a bank, to bind the stockholders so as to take a large sum out of their assets, could not undertake such a job; it is no part of its business. I should hold that such a bargain as that, made with the directors, was an individual thing, and bound them personally, if at all, and not the bank. I should say that so far as this case rests on an agreement to do a thing and failure to do it, the bank was not competent in law to make such an agreement; and so far as doing anything about the bonds, there is no proof that they ever could have got her bonds, ever had a chance to get them or acted about them in a way that they could be charged with neglect. Now about the first part of the case, for the negligent keeping, actual keeping of the bonds in the bank, the proof that stands here is that the Northampton National Bank received these bonds to keep; she signing, as she said she supposed she did, a certain paper envelop in which the bonds were placed. We have no proof here except that the bonds were left there by her; that she called for them and didn't get them; they were gone, they were stolen. The pleadings say that, and I believe the witness says that the directors said that. I am inclined to rule on that also in favor of the bank. So you may take a verdict for the defendant.

The jury accordingly rendered a verdict for the defendant.

McKenna agt. Edmundstone.

COURT OF APPEALS.

PATRICK McKENNA agt. HELEN M. EDMUNDSTONE,
impleaded, &c.

Mechanics' lien law of 1875, applicable to New York city, not repealed by chapter 486 of Laws of 1880 — Jurisdiction of court to make order canceling lien on giving bond.

The mechanics' lien law of 1875, applicable to the city and county of New York, was not repealed by chapter 486 of the Laws of 1880, which by its terms provided for the acquiring and enforcement of mechanics' liens in the cities of this state.

Under the law regulating mechanics' liens, now in force in the city of New York, the court has jurisdiction to make an order canceling the lien on the giving of a bond.

January, 1883.

M. J. Farley, for appellant.

A. C. Thomas, for respondent.

ANDREWS, *J.* — This action was brought to foreclose a mechanics' lien filed by the plaintiff on July 30, 1881, against the premises owned by the defendant Edmundstone, situate in the city of New York, for work done after May 1, 1881.

The order from which the appeal is taken was made under the mechanics' lien law of 1875, applicable to the city and county of New York, which directed the lien to be discharged upon the giving by the defendant of a bond with sureties for the payment of any judgment which might be recovered in the action pursuant to subdivision 4, section 15 of that act.

It is claimed by the appellant that the act of 1875 was repealed by chapter 486, Laws of 1880, entitled "An act to secure the payment of mechanics, laborers and workmen who perform work; also persons furnishing materials toward the erection, altering or repairing buildings, wharves, vaults or any other structure in the cities of the state of New York;" and the determination of this appeal depends upon the correctness of this contention.

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It is well settled that a special and local statute providing for a particular case or class of cases is not repealed by a subsequent statute general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general act, but for the special law, include the cases provided by the latter (*Matter of the Commissioners of Central Park*, 58 *N. Y.*, 493). This is but the application of the larger rule that a statute is not to be deemed repealed by implication by a subsequent act upon the same subject, unless the two are manifestly inconsistent with and repugnant to each other, or unless the clear intention is disclosed on the face of the latter statute to repeal the former one (*Bowen agt. Lease*, 5 *Hill*, 225).

There was no express repeal of the statute of 1875 in the statute of 1880, and if the former statute was repealed by the later one, it must be upon the ground that the two cannot consistently stand together, in which case a repeal by implication is necessarily effected. The statute of 1875 related exclusively to the city and county of New York; the statute of 1880 relates to the cities of the state, and while the city of New York, in the absence of any other statute upon the subject of mechanics' lien, would be deemed included within its purview, that alone is not sufficient to indicate an intention on the part of the legislature to repeal the act of 1875.

It was held by this court, in *Van Denburgh agt. The Village of Greenbush* (66 *N. Y.*, 1), that chapter 558, Laws of 1869, which amended the lien law of 1854, applicable to certain counties in the state, by extending its provisions to all counties except Erie, Kings, Queens, New York and Onondaga, did not operate as a repeal of chapter 778, Laws of 1865, which enacted a special lien law applicable to the county of Rensselaer. And in *Whipple agt. Christian* (80 *N. Y.*, 523) it was held that the lien law of 1844 (*chap.* 305), applicable to all the cities in the state, except New York and certain specified villages, including Canandaigua, was not repealed as to that village by chapter 204, Laws of 1858, which extended

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the lien law of 1854 to all the counties of the state except New York and Erie.

The rule that the later statute does not repeal a former one relating to the same subject, but limited in its application to a particular locality, is applicable, although the more general statute does not embrace the whole territory of the state. A statute affecting all males or all females or all infants would plainly be a general one, and on the same principle an act applicable to all cities is general in contradistinction to a statute applicable to one city only (*See In re. The Evergreens*, 47 N. Y., 216). It is claimed that the intent of the legislature in passing the act of 1880 to repeal the act of 1875 is shown by the fact that the city of Buffalo is excluded from its provisions. This, it is claimed, affords an inference of an intention to include all the cities of the state except the one specially excepted, on the construction that the exclusion of one city is the inclusion of the others. But we think this does not afford that clear evidence of intention which justifies us in holding that the former statute was repealed by implication.

The legislature, at the same session in which the act of 1880 was passed, also enacted a special lien law for the city of Buffalo (*Laws of 1880, chap. 143*), and the legislature, for greater caution, may have excepted the city of Buffalo from the general law to prevent any doubt that the special act was not superseded. But we think it would be extending the inference beyond its legitimate limits to infer from such exception an intention to repeal the act of 1875.

The New York city consolidation act of 1882 (*chap. 410, sec. 1807, et seq.*) incorporates provisions found in both the act of 1875 and that of 1880, but we do not perceive that it affords any light upon the point here considered.

We are of opinion, therefore, that the act of 1875 was not repealed by the act of 1880, and that the court had jurisdiction to make the order in question.

All concur, except RAPALLO and MILLER, JJ., absent.

Matter of Van Epps.

SURROGATE'S COURT.

In the Matter of the estate of H. V. D. VAN EPPS, deceased.

Statute of limitations—Petition of next of kin to compel administrator to account—What lapse of time bars the application.

The next of kin of a deceased intestate must institute proceedings within the time in which actions of a similar character are required to be commenced, to compel the administrator to account and to distribute the estate.

One Van Epps died intestate in 1858, and in that year H. Van Epps was appointed administrator. In 1862, A. Van Epps, one of the next of kin applied by petition to the surrogate, to compel the administrator to account and for his share of the estate:

Held, that lapse of time barred the application.

Albany County, December, 1882.

HARPER V. D. VAN EPPS died March 20, 1858, intestate; letters of administration issued to John C. Van Epps August 6, 1858. On the 10th day of November, 1882, Abram W. Van Epps, a brother of the deceased, presented a petition to the surrogate, praying that the administrator be required to account, and that such further proceedings be had as are necessary to enforce the payment to the petitioner of his share of the estate of the deceased. A citation was issued. On the return day the administrator appeared and plead the statute of limitations.

Edward J. Meegan, for administrator.

I. The surrogate should dismiss the proceeding as more than six years have elapsed since the expiration of the eighteen months subsequent to issuing letters of administration, the time allowed by law to executors and administrators to settle estates. The six year clause in the statute of limitations applies to this case (*Cole* agt. *Terpenning*, 25 Hun, 482; *Clark* agt. *Ford*, 1 Abb. Ct. of App., 359; 3 *Keyes*, 370; 34 *How.*

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Pr., 478; *House agt. Agate*, 3 *Redf. R.*, 307; *Clock agt. Chadeaque*, 10 *Hun*, 97; *Smith agt. Remington*, 42 *Barb.*, 75).

William E. Edmonds, for petitioner.

P. A. ROGERS, *Surrogate*.—The petitioner comes too late. I must apply the statute of limitations. In addition to the cases cited by counsel, I know of *McCabe agt. McCabe*, decided by the general term of the supreme court of the third department, covering the points presented herein by the petition. The authorities are uniform in holding the doctrine contended for by the counsel for administrator. Let an order be entered that the relief asked for in the petition be denied.

N. Y. SUPERIOR COURT.

THOMAS MURTHA, respondent, agt. MICHAEL CURLEY,
impleaded, &c., appellant.

Costs—*Judgment reversed on appeal to general term with costs of appeal to appellant defendant—On appeal to court of appeals, order of general term was reversed, and judgment of trial term was affirmed, with costs to plaintiff—Who entitled to costs of general term.*

When plaintiff obtained on trial of an action a judgment against a defendant, who appealed to the general term which reversed the judgment of the court below, with costs of appeal to the defendant appellant to abide the event of a new trial. On appeal by plaintiff to the court of appeals the order of the general term was reversed and judgment of trial term was affirmed, with costs to plaintiff :

Held, that the plaintiff was not entitled to the costs of the general term. The words "with costs" in the order of the court of appeals means the costs in that court (*Reversing S. C.*, ante, 222).

General Term, January, 1883.

Before SEDGWICK, C. J., TRUAX and O'GORMAN, JJ.

APPEAL from an order made at special term directing the clerk to tax certain costs.

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The plaintiff obtained, on the trial of the action, a judgment against the defendants for a certain sum of money. From this judgment the defendant Curley appealed to the general term of this court, which reversed the judgment of the court below, with costs of appeal to the appellant, to abide the event of a new trial. The plaintiff appealed to the court of appeals. The order of the general term of this court was reversed by the court of appeals, and the judgment of the trial term was affirmed, with costs to the plaintiff. The plaintiff then presented his bill of costs for taxation to the clerk, who refused to tax the costs of the general term in favor of plaintiff. The plaintiff then moved at special term for a retaxation of said costs, and the special term made an order directing the clerk to allow to the plaintiff the costs of the general term.

Starr & Hooker, for appellant.

Adolphus D. Pape and *H. S. Bennett*, for respondent.

TRUAX, *J.*—The order of the general term limited the recovery of the costs of the general term to the defendant Curley, who was the successful party on the appeal to the general term, only in the event that he should finally succeed in the action. The general term had the power to reverse the judgment, with costs to abide the event, in which event the party finally succeeding in the action would have been entitled to tax the costs of an appeal or trial at which he had been beaten (84 *N. Y.*, 469).

The costs to be awarded upon the granting of a new trial are in the discretion of the general term, and may be awarded to either party absolutely, or to abide the event (*Code of Civ. Pro.*, sec. 3238.)

In this case the general term saw fit to award the costs of the appeal to the defendant Curley. It did not award them to the plaintiff. The plaintiff could not have them in any event, because he did not maintain the judgment in his favor

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(Howell agt. Van Sicklen, 8 Hun, 525). It is true that the court of appeals reversed the judgment of the general term, "with costs," but the words "with costs" in the order of the court of appeals means the costs in that court (68 N. Y., 628).

The order of the special term should be reversed, with ten dollars costs of the appeal and disbursements, and the taxation of the clerk should be affirmed.

COURT OF APPEALS.

THE SHELDON HAT BLOCKING COMPANY, appellant, agt. THE EICKEMEYER HAT BLOCKING MACHINE COMPANY, ARCHIBALD T. FINN, and CHARLES ATWOOD, respondents.

Corporation — Power of trustees to transfer property to pay debts — Estoppel — Effect of delay in seeking equitable relief.

Acts of a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on these acts. It is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an acquiescence in it, and if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the stockholders will be estopped from questioning it.

While it is true that directors and trustees of a corporation are its agents to advance the purposes and objects of its organization, and have no authority, in virtue of their office, to perform acts, which to all intents and purposes, terminate the corporation by taking away from it the power to accomplish the object of its formation; yet it is the duty of the trustees of a corporation to pay its debts and to apply the corporate property to this end, although it should exhaust them, and thus disable the corporation from carrying on its business.

The plaintiff, a corporation formed for the purpose of blocking and shaping hats, and making and licensing machines for stretching hats, for

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which it had letters patent, was prosecuted in the federal courts by the defendant corporation, for an infringement of its letters patent for stretching hats; the action resulted in a decree by which it was adjudged that the plaintiff's process was an infringement of the defendant's process, and it was perpetually enjoined from using the same, and it was adjudged to pay the sum of \$97,000 as damages for the infringement, which plaintiff was unable to pay. Whereupon the trustees of the plaintiff entered into negotiation with the trustees of the defendant corporation for a settlement of the damages, which resulted in an agreement that the plaintiff should transfer to the defendant corporation its patents for blocking, as well as those for stretching hats, which latter had been adjudged to be an infringement, in payment and discharge of the judgment for damages, and which agreement was consummated by such transfer:

Held, in an action brought five years thereafter in the name of the plaintiff corporation to set aside such transfer as fraudulent, and as *ultra vires*, that the transfer was valid and should be upheld, it not appearing that the plaintiff had at the time any other means of paying the judgment, and no offer being made, even now, to pay the same, and no readiness or ability to do so being alleged in the complaint.

A principal on being informed of the act which his agent has assumed to do in his interest, is bound to affirm or disaffirm within a reasonable time. The doctrine of equitable estoppel applies to members of corporate or associate bodies, as well as to persons acting in a natural capacity.

Decided December, 1882.

THE plaintiff is a corporation duly organized under the laws of the state of New York, and its object, as stated in its articles of association, "was, among other things, for the purpose of blocking and shaping fur and wool hats, and that a part of its business was in manufacturing and licensing machines for stretching and blocking hats."

The defendant was also engaged in the same general business under patents of the United States owned by it.

In the year 1870 the defendant commenced an action in the federal court against the plaintiff, charging it with infringing its patents for stretching the brims and tips of hats. This action resulted in a decree made on or about January 31, 1873, by which it was adjudged that the plaintiff's process was an

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infringement upon the defendant's patents for stretching hats, and a perpetual injunction was issued thereupon against the plaintiff and certain persons, its licensees, who were joined as defendants. By the decree it was referred to a master to take an account of the profits which the plaintiff had made from the said infringing machine, and all the damages which the said defendant had sustained by reason of such infringement; and on or about April 16, 1873, the master reported the profits made by the plaintiff to be \$7,000 and upwards, and the damages sustained by the defendant to be \$91,000 and upwards.

Pending the reference before the master the officers of the plaintiff, becoming apprehensive of the result of the reference, made overtures on its behalf to the defendant corporation for some arrangement or adjustment of the controversy; but no settlement or arrangement could be effected which involved the plaintiff's right in any way to use the defendant's process. The officers of the plaintiff were advised that the only course open to them, in so far as the further contest was concerned, was to give security, which would be in double the amount reported by the master, and appeal from the judgment. It is found by the court as a fact that the plaintiff was unable to furnish the security to appeal to the supreme court of the United States, and had no property except its patents and some machines for blocking and stretching hats which were in the hands of its licensees, and no money except a few thousand dollars due from such licensees. That by reason of the result of said suits in the circuit court of the United States the further prosecution of the plaintiff's business was rendered hopeless unless some arrangement could be made with the defendant whereby the right to use its patents might in some way be secured. That Archibald T. Finn, one of the defendants, as president of the plaintiff, proceeded to negotiate with the defendant, the Eickemeyer Company, for a settlement of the profits and damages recoverable under the said decree of the United States court against the plaintiff, and failing to secure other terms, finally offered to convey to the

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defendant all the letters patent for blocking and stretching hats belonging to the plaintiff, whether standing in its own name or in the name of others, and outstanding licenses granted by the plaintiff for the use of machines made pursuant to said letters patent, in satisfaction of the claim of the defendant for the profits and damages they were entitled to recover pursuant to the decree of said United States court under the report of said master, which proposition was accepted by the defendant. And in pursuance thereof, assignments of said patents and an assignment of outstanding licenses and agreements made by and between the plaintiff and its licensees were executed and delivered to the defendant, and a release of the profits and damages awarded to the defendant was executed and delivered to the plaintiff. That by the terms of the settlement the defendant was to collect the sums due the plaintiff from licenses prior to the 1st day of April, 1873, and pay the same over to the plaintiff, which it subsequently did, amounting to about the sum of \$8,000. That by the plaintiff's certificate of incorporation the number of trustees of the plaintiff was fixed and limited at three, and that Archibald T. Finn, Julius Sheldon and Charles Atwood, jr., were named in said certificate as the first board of trustees of said plaintiff and have ever since continued to be the only trustees of the plaintiff. That Finn was the president of said corporation and that the business and affairs of said plaintiff were entirely managed and conducted by said Finn, Atwood and Sheldon. That on April 10, 1873, it was well known to said three trustees and to a considerable number of the stockholders of the plaintiff that large damages would be awarded by the said master in his report to be made in favor of defendant and against the plaintiff. That on April 10, 1873, a meeting of the board of trustees of the plaintiff was held, at which Finn and Atwood attended and of which Sheldon had notice, and that at said meeting a resolution was passed reciting that the suit had been decided against the company by which the company had been made liable for a large amount of damages

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which was then in course of being ascertained, and when ascertained would have to be paid, and that the company had no means of paying such damages except by the sale of its property and effects. The president was authorized to negotiate and conclude a settlement, and for that purpose was "authorized on behalf of the company to make and enter into any consent, confession, stipulation and agreement in respect to such damages and the amount thereof; and that in order to pay said damages and costs the whole or so much as may be necessary of the property, patents, patent rights, assets, effects, rights and interests belonging to and appertaining to this company, legally and equitably, be sold, assigned and transferred. That the president be and he is hereby authorized to sell, assign and transfer the same or any of them or any part of any of them for the best price he can obtain for the same, and make, execute, acknowledge, prove and deliver all deeds, assignments, transfers and other instruments in writing necessary and proper in the premises, and to affix the seal of this corporation thereto, and sign his name thereto as president." It was under the authority of this resolution that the president acted in assigning to the defendant the patents and property of the plaintiff. That several of the stockholders of the plaintiff were informed of said proposed arrangements before the agreement was executed, and that all the stockholders of the plaintiff, at or about the time of the transfer of said patents and licenses, were informed of the fact of its having been made, but up to the time of the commencement of the action, in the year 1877, took no steps to impeach the same, and since such time said plaintiff ceased to do business and has never resumed its business in any way.

George Ticknor Curtis, for appellant.

Luther R. Marsh, for respondents.

TRACY, J.—The trial court having found that the settlement made between plaintiff and defendant "was not the offspring

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of fraud," but was made by the trustees of the plaintiff and the defendant in good faith; that the value of the property transferred was not greater than the claim of the indebtedness of the plaintiff to the defendant, and the judgment having been affirmed at general term* the only ground upon which it can be attacked in this court is that the trustees had no power or authority to make such settlement or transfer of its property. It is upon this ground that the learned counsel for the plaintiff assails the judgment. He insists that the act of the trustees in voting to sell and transfer all the property of the Sheldon company, and thus rendering it practically impossible for it to continue the business for which it was incorporated, and inflicting upon it virtual political death, was *ultra vires*. Conceding, without deciding, this position to be well taken, we are nevertheless of the opinion that this judgment must be affirmed. The act was not illegal. In transferring the property of the corporation to pay its debt the trustees believed that they were acting within the scope of their authority, and the defendant accepted the transfer and received the property in satisfaction of its claim against the plaintiff, in the honest belief that it thereby acquired good title thereto. If the trustees had no power as the agents of the corporation to transfer all its property, thus depriving it of the means of carrying on the business for which it was organized, it is but the case of an agent making a contract in excess of his authority. The act is voidable, not void. The principal may, nevertheless, affirm the act, and a ratification is equivalent to a prior authorization. If all the stockholders of this corporation had, with full knowledge, subsequently

* This case was tried at the special term, first department, supreme court. The opinion of the judge at special term is reported in 56 *Howard's Practice Reports*, 70. The judgment of the special term was affirmed by the general term (21 *Hun*, 617). The general term, in its *per curiam* opinion, said that on an examination of the case, it was lead to the same conclusions as those reached by the trial judge, and in affirming the judgment, adopted the opinion of the judge at special term.

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ratified the transfer and affirmed the settlement, the act—though beyond the power given the trustees by the charter—could not be subsequently avoided by the stockholders or by the corporation. This case falls within the rule established by this court in the case of the *Quicksilver Mining Company* (78 N. Y., 159).

It was there held that the acts of a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting however only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on these acts. That it is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an acquiescence in it, and if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken without loss if the act were held invalid, the stockholders will be estopped from questioning it.

We think upon the facts found in this case, supplemented by supporting facts proven but not found, the stockholders of this corporation must be deemed to have assented to and ratified the settlement made by their trustees. They knew that the settlement had been made. They knew that all the property of the company had been transferred to make such settlement. They knew that the corporation, in consequence thereof, had been compelled to suspend business. They knew that the Eickemeyer company had received their property in settlement of a claim against the corporation of which they were the stockholders, and had executed a release of such claim. They knew that, relying upon the validity of such settlement, the Eickemeyer company had undertaken to collect the licenses due to their corporation from its licensees prior to such settlement, and to pay the same over to their

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president, and that such collections had been made and paid over to the extent of about \$8,000; and it must be assumed that they knew that the Eickemeyer company would use the patents transferred to it in the further prosecution of its business, and would earn profits from such use, and would conduct its business and grant licenses to its licensees upon the faith that it was the owner of such patents, and yet, for four years they did nothing to question or repudiate the settlement made in their behalf. Had an individual acting in his natural capacity thus slumbered upon his rights violated by an agent who had exceeded his authority, no one can doubt but that his long acquiescence would have amounted to a ratification. The rule is well settled that a principal, on being informed of the act which his agent has assumed to do in his interest, is bound to affirm or disaffirm within a reasonable time. The doctrine of equitable estoppel applies to members of corporate or associate bodies as well as to persons acting in a natural capacity (2 *Story's Equity Jurisprudence*, sec. 1539).

The learned counsel for the appellant seeks to avoid the force of this equitable estoppel by alleging that it was neither pleaded by the defendant in his answer nor found as a fact by the referee.

The court finds that the settlement and transfer were made in good faith and without fraud, and finds for four years and three months, and up to the time of the commencement of this action in the year 1877, the stockholders of the company, although they knew of the transfer and settlement, took no steps to impeach the same, and since the day of settlement the defendant has been engaged in the business of granting licenses for both stretching and blocking hats under the letters patent assigned to it by the president of the plaintiff, and has received royalties from nearly all the machines formerly owned by the plaintiff and transferred to it. To these findings of fact there is no exception, and as a conclusion of law the court finds and determines that the plaintiff is not entitled to maintain its action. These facts we think sufficient to

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constitute an equitable estoppel within the rule of the quick-silver case, and having been proved and found by the referee, without exception, it is unnecessary to discuss whether the estoppel set up by the defendant is a legal or an equitable one. It is urged that the doctrine of equitable estoppel cannot be relied upon to defeat this action for the reason that defendant in this case had full knowledge of all the facts upon which the rights of the party he seeks to estop depend. But the sufficient answer is, that there is no finding by the court that the officers of the defendant conducting the settlement had knowledge of facts, which made the transfer invalid. So far as their knowledge is disclosed by the facts found, it is limited to the fact that the plaintiff had, in the prosecution of its business, infringed a patent owned by the defendant, had been prosecuted for such infringement, a recovery had been had to the extent of about \$99,000, and the actions were settled by a transfer of the infringing patent and all the other patents owned by the plaintiff, to the defendant. The counsel should at least have requested the court to find that the officers of the defendant corporation had knowledge of the further facts now relied upon to establish the invalidity of the transfer. No such fact is found and no request was made so to find. But assuming that the officers of the defendant had known that the acts of the trustees of the plaintiff were *ultra vires*, it is well settled that such long acquiescence amounts to an equitable estoppel, and will validate an invalid agreement. As "where power was given by the deed of settlement at a meeting of two-thirds in number and value of the shareholders, to borrow money on debentures, and the directors borrowed money on debentures upon the resolution of a meeting at which the requisite number did not attend, and the debentures were issued to persons present at the meeting, and the money applied in payment of the debts of the company, and interest paid on the loans for two years, it was held that the original issue of debentures was invalid, but that it was cured by the

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subsequent acquiescence of the company" (*Story's Equity Jurisprudence*, sec. 1539; *In re Magdalena Steam Navigation Company*, 6 Jour. (N. S.) 975; *The Quicksilver case*, *supra*).

In *Smallcomb's case* (*Law Rep.*, 3 Eq., 769), lord ROMILLY, master of the rolls, declares that lapse of time and acquiescence on the part of the party whose interests are alleged to have been injuriously affected by irregular proceedings, will be a complete bar unless the transaction is tainted with fraud involving grave moral guilt. Upon this ground an agreement between the shareholders and directors of a joint-stock company was upheld, although admitted to have been originally *ultra vires*, and although the books of the company accessible to the shareholders did not show the real nature of the transaction. This case was affirmed in the house of lords (*Law Rep.*, 3 H. L., 249; see also *Brotherhood's case*, 31 Beavan, 365). And in cases of actual fraud the courts of equity feel great reluctance to interfere where the party complaining does not apply for redress at the earliest convenient moment after the actual character of the fraudulent transaction comes to his knowledge.

The party upon whose rights or interests a fraud is committed should not be allowed, after the fact comes to his knowledge, to speculate upon the possible advantages to himself of confirming or repudiating the transaction. He must repudiate at once and surrender his securities (*Story's Eq. Jur.*, sec. 1599a; *Parks agt. Evansville R'y Co.*, 23 Ind., 567; see also *Perret's case*, L. R., 15 Eq., 250).

Had the officers of the defendant known that the trustees of the plaintiff were acting without first obtaining the consent of its stockholders, and that the effect of such settlement and transfer would be to put an end to the existence of the corporation, they would then have known nothing more than that the trustees were exercising a doubtful authority—one which could certainly be made valid by subsequent ratification, and the validity of which would be rendered doubtful only

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in case the stockholders disaffirmed the settlement and took proceedings to set it aside. Such settlement must from its consequences have been immediately known to them, and the defendant had a right to assume from the long acquiescence which followed that the stockholders had affirmed and ratified the same.

The plaintiff was bound to assume that the defendant would use, in the further prosecution of its business, the property which had cost it nearly a hundred thousand dollars, and that one of the methods of putting the patents to profitable employment would be the granting to others the right to use machines made in accordance with them, and the referee finds that such contracts were made.

To allow the plaintiff or its stockholders to lie by for more than four years, thus inducing the defendant to take no steps to enforce the payment of its recovery against the plaintiff and permitting it to use this property as its own, in the belief that it had acquired an unimpeachable title thereto, and make contracts whereby it incurred obligations to others, and then to come in and take to themselves the profits resulting from the defendant's management, without paying or offering to pay the amount recovered by the defendant, would work a gross wrong and injustice; for it must be borne in mind that if the transfer from the plaintiff to the defendant be set aside, the latter must not only account for the profits, but would be liable upon contracts which it had made with third parties for the use of these patents. The fact that Finn, the president of the plaintiff, was also joined as a defendant in the infringing suit, and that the recovery went against him personally as well as against his company, we do not think necessarily disqualified him from acting on behalf of the corporation, or constituted a settlement thus made a fraud in law upon the stockholders of his company. Connected with the charge of his having made a fraudulent settlement with the defendant, one of the alleged motives being to escape this personal liability, it was no doubt a most material circumstance to be

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considered; but the charge of fraud having been disproved and the court having found that the settlement was made in good faith, the fact becomes immaterial.

Nor can the transfer or settlement be declared void as being in violation of section 4, title 4, chapter 18, of part II of the Revised Statutes. No creditor, or person representing a creditor, seeks to impeach such transfer. If the section has any application to this case, there are no findings or requests to find which can raise the question.

Judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN MCEWEN agt. WILLIAM H. KEELER.

Office and officer — Constitutional law — Sheriff — Chapter 251 of the Laws of 1882, taking away the custody of the jail and of the prisoners from the sheriff and giving it to an officer appointed by a county board is unconstitutional.

The common-law duties of a constitutional officer elected by the people cannot be transferred by the legislature to an appointed officer.

Section 1 of article 10 of the constitution of this state provides for the election by the people of sheriffs, fixes the term of office, &c., but does not define the powers, rights or duties belonging to the office. In construing this section it must be held that it was intended to invest the office of sheriff with the functions given to it by the common law. By the common law the sheriff is the keeper of the common jail. A legislative enactment, therefore, that assumes to take away the custody of the jail and of the prisoners from a sheriff, giving such custody to the superintendent of a penitentiary who is appointed by a county board, is an infraction of this section and void.

The legislature may declare what building shall constitute the county jail if the custody of the building and of the prisoners therein remain with the sheriff.

Chapter 251 of the Laws of 1882 adjudged unconstitutional.

Third Department, General Term, February, 1883.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

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APPEAL from an order of the special term awarding a peremptory *mandamus*. The facts are stated in the opinion.

E. Countryman and *Edward J. Meegan*, for appellant.

I. Chapter 251 of the Laws of 1882, under which the relator claims, is in violation of section 1 of article 10 of the constitution (*Faut agt. Gibbs*, 54 *Miss.*, 396; *King agt. Hunter*, 65 *N. C.*, 603, 612; *State agt. Hastings*, 10 *Wis.*, 531, 533; *People agt. Bull*, 46 *N. Y.*, 61, 63; *People agt. Blake*, 49 *Barb.*, 9; *People agt. Acton*, 48 *Barb.*, 524).

II. The chapter in question is a violation of article 3, section 16, of the constitution. The title of the act is "An act relative to the penitentiary of Albany county." This was a local bill while in the course of its passage through the legislature (*People agt. Allen*, 42 *N. Y.*, 405, 417; *People agt. O'Brien*, 38 *N. Y.*, 193; *People agt. Hills*, 35 *N. Y.*, 448; *Goskin agt. Meek*, 42 *N. Y.*, 186; *People agt. Supervisors*, 43 *N. Y.*, 10; *Huber agt. People*, 49 *N. Y.*, 132). There is no allusion or intimation in the title of the act that it relates to the county jail, or to the jailer or to the sheriff. Who would have supposed from this title that the electors were to be deprived of the constitutional right of choosing the officer who was to have the exclusive custody of the common jail and the prisoners confined therein.

Peckham & Rosendale, for relator, respondent.

I. The provisions of chapter 251 were mere regulations as to the duties of the office of sheriff and were clearly constitutional.

II. So far as said chapter takes away the emoluments of the office of sheriff arising from the boarding of prisoners it does not come within the constitutional provision which prohibits the taking away or reduction of salary or emoluments, because said chapter went into effect and practical operation over a month before the defendant entered upon the duties of the office of sheriff, and, of course, after the deduction had been decreed by the legislature (*Smith agt. The Mayor*, 37 *N. Y.*,

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518; *The People agt. Devlin*, 33 *N. Y.*, 269, 272; *Connor agt. The Mayor*, 5 *N. Y.*, 285; *People agt. Roper*, 35 *N. Y.*, 639; *People agt. French*, 12 *N. Y. Weekly Dig.*, 456).

III. The act is a general one relating to the administration of justice, both civil and criminal (*Brown agt. The People*, 75 *N. Y.*, 437; *Williams agt. The People*, 24 *N. Y.*, 405).

BOCKES, *J.* — Under the statute passed in 1882 (*chap.* 251), the relator, who is superintendent of the Albany county penitentiary, executed, on the 1st day of January, 1883, the bond provided for in section 2 of that act, and had the same approved by the county judge. He then tendered the same to the respondent, the sheriff of Albany county, for his approval and acceptance. The latter refused to approve or accept the same, upon the ground that the statute was unconstitutional. Thereupon the relator obtained an order for a writ of *mandamus* to compel the respondent to accept and approve such bond. No question was made as to the form or sufficiency of the bond, nor was any question made as to the propriety of this remedy, if the law was constitutional.

The learned judge who granted the order wrote no opinion. Indeed, it is quite evident that he gave no special consideration to the subject, as the parties were desirous of reaching a speedy decision in an appellate court.

The question, therefore, comes to us practically to be considered as an open question in the case, and the only question argued on this appeal has been the constitutionality of that statute. To that we shall therefore confine our attention.

It is claimed by the respondent that the statute is a violation of article 10, section 1 of the constitution, which provides that sheriffs shall be chosen by the electors of their respective counties, and the argument of the respondent is that the statute takes from the sheriff of Albany county and gives the superintendent of the penitentiary (an officer that is not elected) powers and duties which cannot thus be taken away.

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On the part of the relator, as we understand, it is not disputed that a law which should take away all, or practically all, of the powers and duties of a sheriff and should give them to some officers not elected by the people, would be a violation of the constitution, even though it should permit the people to elect an officer, who should have the name of sheriff, though stripped of all power and duty. And we think this must be so. The constitution does not permit the legislature to evade its provisions by taking away the powers and duties of an officer made elective by that instrument and giving them to some appointee, leaving the people the poor privilege of electing an officer who is such only in name.

On the other hand, it is admitted by the respondent that, to some extent, the legislature may modify and regulate the duties which sheriffs are or were to perform. Perhaps the legislature might even abolish the duties and powers or some of them, altogether, as obsolete and no longer needed. But the question here presented is not one of abolishing, but of transferring powers and duties. It was even said, on the argument, that the legislature might require the punishment of convicts to be by confinement in penitentiaries instead of county jails, although the latter are, and the former are not, under the control of the sheriff. That would be a part of the punishment of crime as to which the sheriff's duties might be considered to be incidental.

The question then to determine is whether the present statute is a mere regulation of the sheriff's duties and powers, permissible under the constitution, or whether it so transfers his duties and powers to an appointed officer as to infringe the meaning of that instrument.

Let us then in brief consider what the statute does. It makes the Albany county penitentiary the county jail of the county, and makes the superintendent the jailor. It prevents the sheriff hereafter from appointing a jailor. It gives to the superintendent the custody and control of all prisoners confined therein, as the sheriff would have had if the law had

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not been enacted. Thus it will be seen that, as to all persons arrested under civil or criminal process, it takes away the custody and control and gives it to the superintendent. Notwithstanding that the sheriff is made liable by law for the custody of persons arrested in civil actions, this statute takes them out of his hands and places them in the custody of the superintendent. We need not discuss, but we cannot fail to notice the serious question which may arise as to the sheriff's liability in the case of an escape. Whether the bond provided for in the statute would be a sufficient protection, will depend upon the amount involved in the orders of arrest which may be issued. Perhaps, however, this subject touches rather the wisdom than the constitutionality of the law.

The only authority in regard to prisoners left to the sheriff is to direct the superintendent to convey prisoners to and from said jail. The question then is whether the custody and control of the prisoners arrested under civil and criminal process is such a part of the sheriff's office as it existed at and before the adoption of the constitution, that such control cannot be taken from him and given to an officer elected by the people without a violation of that instrument. Blackstone, in his account of the power and duty of the sheriff, says that they are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff (1 *Bl. Com.*, 343). He is bound to take all misdoers and commit them to jail for safe custody, and he may command all the people of his county to attend him, which is called the *posse comitatus*. Jailers are the servants of the sheriff, and he must be responsible for their conduct (*Id.*, 346). This general statement is substantially correct now, and need not be enforced by citations. It has been the duty of the sheriff to arrest and confine all persons charged with crime, and to execute the process of the higher courts; and to discharge this duty he may summon the power of the county. A power so great the constitution provided should be intrusted only to an officer chosen by the people, thus returning to the

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old principles of English law (1 *Bl. Com.*, 339); and those who framed that instrument may well have feared to give that power over the persons of citizens to any one not chosen by them.

That the sheriff is by common law, and except for this statute, the keeper of the common jail, even when he acts through a jailer, will hardly be questioned (*Becker agt. Ten Eyck*, 6 *Paige*, 68; *Wemple agt. Gleason*, 57 *How.*, 109, 113). In the execution of process from the higher courts, such as orders for arrest, process for contempts and executions against the body, he is to arrest and confine persons against whom such process is issued, whenever such process is issued, and generally the criminal matters (excepting perhaps the cases of petty offenses and police regulations). He has the custody of persons charged with crime. Let it be considered then that the law is valid, and let us see what power would remain to him. He might arrest, but might not confine, under civil or criminal process or under proceeding for contempt. He might serve mesne process, and process mesne and final, against property, and he might attend courts and summon jurors, &c. All control and custody over persons charged with crime or amenable to civil process, would be taken away, after the act of arrest had been done. It is not necessary to say that the legislature cannot abolish some, or perhaps all of the duties of the sheriff. For instance the legislature might abolish all imprisonment in civil cases, as well in cases of tort as on contract, and such legislature would destroy a part of the present duties of the sheriff. But the question, as above remarked, is not whether the legislature can abolish, but whether it can retain those powers and duties, and give them to an officer not elected. Upon this point the case of *Warren agt. People* (2 *Denio*, 242) seems to be conclusive, and the reasoning therein is sound. It may be difficult to draw the line in regard to numerous instances which are suggested by the relator's counsel, of taking away from sheriffs certain special duties, and giving them to an appointed officer, and to say, as to

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each, whether it would be a violation of the constitution or only a permissible modification of the sheriff's duties. If any general rule could be laid down it would probably be that the common-law powers and duties pertaining to the office of sheriff could not be transferred to an appointed officer, whatever might be done as to powers and duties of another character (*People agt. Draper*, 15 *N. Y.*, 532). It is enough, however, to consider the present case. For the general doctrine on this question we need only refer to *People agt. Albertson* (55 *N. Y.*, 51) and *People agt. Raymont* (37 *N. Y.*, 428), without quoting from these or similar cases; and in the application of that doctrine we cannot doubt that the custody of the jail and of the prisoners confined therein is one of those powers and duties which by common law belonged to the sheriff, and which continued to belong to him down to the adoption of the constitution. In declaring, therefore, that the sheriff should be elected, the constitution must have intended an officer who among other things should possess that custody. If it be possible to transfer this power to another and an appointed officer, then other powers in like manner may be transferred to other officers, so that in the end the sheriff may be deprived of every power and duty which the common law gave him (*State agt. Brunst*, 26 *Wis.*, 414). We are therefore of the opinion that so far as the statute in question takes away custody of the jail and of the prisoners from the sheriff and gives such custody to the superintendent, it is unconstitutional. It would seem to follow necessarily from this that the sheriff was not bound to accept or approve of the proposed bond.

There is a question remaining which is not before us, but to which we may allude: Is that part of the statute valid which declares that the penitentiary shall be the county jail? It does not seem to be controverted that the legislature might declare what building should constitute the county jail, provided the custody of the building and of the prisoners therein were to remain with the sheriff. And it may be urged that

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though part of this law be unconstitutional, yet the rest may be valid. This point has not been discussed. It was probably understood by both sides that the statute was a whole, and that if a principal part of it was unconstitutional and void the rest must necessarily fall with it.

The order must be reversed, with ten dollars costs and printing disbursements, and the motion denied, with fifty dollars costs and disbursements.

COURT OF APPEALS.

THE PEOPLE agt. THE GLOBE MUTUAL LIFE INSURANCE COMPANY.

Insurance agents' salaries — When company becomes insolvent and passes into the hands of receiver, and is also dissolved by the action of the state, agent cannot recover from fund in hands of receiver salary for his unexpired term.

Where a life insurance company has contracted with a person to act as its general agent for a stipulated number of years at a specified yearly salary and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the state before the expiration of the term for which such agent was hired, such agent has no legal right to recover from the fund in the hands of the receiver the salary fixed by the agreement for the unexpired term of service as damages for not continuing the employment, the contract having ended with the corporate dissolution by the action of the state, and there is no valid claim for damages for an alleged breach of the agreement by the company (*See S. C., ante, 240*).

Decided January, 1883.

CLAIM of John C. Mix, as general agent.

Edwin C. James, for appellant.

George W. Wingate, for receiver.

John C. Keeler, deputy attorney-general.

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FINCH, J. — There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal or which made it unable to carry out its contract. For aught that appears it would have done so if let alone, but it was not permitted to perform. The state, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties so that neither could perform or put the other in the wrong, thereupon the company could not refuse, and did not refuse. To put it in the wrong and make it liable for a breach required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part (*Shaw agt. Republic Life Insurance Co.*, 69 N. Y., 292, 293; *James agt. Burchell*, 82 N. Y., 113). He could do neither. Performance by him had become illegal. It would have been a criminal contempt and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts (*Jones agt. Knowles*, 30 Me., 402). So that from the necessity of the case, as there were no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties and must be deemed an unexpressed condition of their agreement.

One party was a corporation. It drew its vitality from the grant of the state and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted

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with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation (*Attorney-General agt. Security Life Ins. Co.*, 78 N. Y., 115). Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract, in its own nature, was dependent upon the continued life of both parties. With the natural death of one or the corporate death of the other the contract must inevitably end; so that in its own inherent nature, by the unexpressed conditions, subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of *Mix* differs from that of the policyholders. We held in the *Security* case that the latter were creditors, and stood upon a breach of their contract; but that breach was not the dissolution of the company. It antedated such dissolution, and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policyholders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The state found these contracts broken, and for that reason interfered, and when its decree of dissolution came, it had to deal with broken contracts, and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention (*Yelland's case*, L. R., 4 Eq., 350; *Clarke's case*, L. R., 7 Eq., 350; *Logan's case*, L. R., 9 Eq., 149; *McClure's case*, L. R., 5 Ch. App., 737; *Dean Gilbert's case*, Law Jour., 41 Eq. [N. S.], 476). In all of them the companies stopped payment before any inter-

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vention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance and therefore a breach of contract, established before the winding up orders were made and the liquidators appointed.

When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases are obviously different (*People agt. National Trust Co.*, 82 N. Y., 283). They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned, directly or indirectly, by the act or omission of the party pleading it as an excuse. In other words, such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act.

And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points, and need not be repeated. He has stated their purport correctly. In all of them, both parties were innocent of and blameless for the outside and independent agency which dissolved the con-

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tract. And the argument is now pressed that, in the present case, the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions—was directly caused by them, and therefore such dissolution must be deemed its own act which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the state as to make the dissolution its own act.

The answer is, that no such fact is shown nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act and the attorney-general thereupon commenced the action for dissolution.

The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest bearing. It may have done so with entire prudence at the time and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution, since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor, having a running contract for service with the shipowner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved (*Melville agt. De*

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Wolf, 4 E. & B., 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault or that of the shipowner, was held sufficient. Then too it could have been argued that if the sailor had not been present at and seen the murder which was his voluntary act and which he might have avoided the law, would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments honestly and prudently made would shrink beyond repair and bring down a dissolution by the state. If in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense and through the same mode of reasoning we might, in a case of master and servant, trace the death of the former to his own negligence in eating, drinking or exposure to heat or cold, and so determine his non-performance to be inexcusable and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion or even the indirect cause of his own death and in the same sense blamable for it, without its being in a legal sense and considered as a *vis major* his own act; so a corporation may be said, through the conduct of its officers, to have in some sort occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the state would be not its own act — not at all the product of its own volition — and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act or neglect on the part of the other officers as may tend under the law to produce a dissolution, if such dissolution in fact

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occurs. That possibility entered into his contract when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfillment of the law's conditions. In the event of such corporate death the motive of the state or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion, and however it may have been provoked or induced it must be deemed the act of the state and not of the corporate body. And it is the independent act of the state, for although the reserve may have fallen below the prescribed level a dissolution is not the necessary consequence. That may follow or may not follow. The superintendent of insurance may make the certificate which sets the law in motion or may withhold it. The matter lies within his sole discretion and control. He may act or not as he chooses; but if he does it is his act and not the company's—dependent wholly on his volition and not on that of the corporation—an independent agency guided by its own motives and not the act of the company producing its own death. If it be asked where this doctrine leaves the policyholders and their claims for breach of contract the answer is two-fold. Where the dissolution follows an impaired reserve their contracts, as we have already said, were broken by the company before the state interposed. But their rights go much deeper than that, for while in the *Security case* we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. If the state had dissolved this company while its contract with the policyholders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policyholders on a different ground. The assets to be distributed would be the reserve or so much of it as remained. That reserve, as we showed in the *Security case*, is made up of the excess of premiums paid by the policyholders in the earlier years of their policies beyond the real cost of insurance to enable

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them to be carried in later years when the risk should be greater. Practically, therefore, at the date of dissolution the reserve represents the earnings of the policies and the contributions of the policyholders. And as in the case of contracts for personal services dissolved without default by death or the act of the law, the contract is apportioned and the servant entitled to his actual earnings to the date of dissolution, so the policyholders would be entitled to the just earnings of their policies to the same date and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equitable ownership, which gives them a right beyond that of mere creditors seeking damages for a breach of contract. To make and to carry out contracts of insurance is the very object of the corporation and the sole purpose of and excuse for its existence. The state gives it life for that end, and takes it away when the result is not reached. It watches it during life to see that it fulfills the purpose for which it was created, and buries it when that purpose fails. And as in the creation of the company and in its supervision and control the rights of the policyholders and their safety are the paramount considerations, so they remain paramount when corporate death is inflicted.

The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a court of equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policyholders in equity, and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and therefore no shadow of an equity against the assets, the policyholders resisting his claim are protected by an equity not to be overlooked or disregarded.

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Other considerations of very serious import were adverted to by the courts below which we need not here discuss. What has been said sufficiently indicates our opinion. No error was committed in rejecting the claim of the general agent.

The order should be affirmed.

All concur.

SUPREME COURT.

WILLIAM G. RAINES agt. LEVI W. TOTMAN.

Warranty — Breach of — Evidence — Burden of proof on plaintiff.

In an action for the recovery of damages under an alleged breach of warranty:

Held, that upon the question as to whether there was a warranty or not, the plaintiff has the burden and must establish it by furnishing the preponderance of evidence.

When the plaintiff swears unqualifiedly and explicitly to a warranty and the defendant as unqualifiedly and explicitly swears there was not, and there is no evidence in the case corroborating the plaintiff, he fails to make out a case of warranty and defendant is entitled to judgment.

Oneida Special Term, December, 1882.

THIS action was commenced for the recovery of \$1,000 damages under an alleged breach of warranty on the sale and purchase of a trotting horse. The cause was tried before the court without a jury. The plaintiff claimed that he purchased the horse of the defendant on his general warranty, that "he was free from disease, was sound and all right," whereas in truth and in fact at the time of the purchase the horse was afflicted with a disease of the eyes known as "specific ophthalmia," and soon after the purchase became totally blind and comparatively worthless for the purposes for which he was purchased. There were but two witnesses to the bargain, the plaintiff and defendant. It was claimed by defendant's counsel at the conclusion of the trial that the

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plaintiff, having the affirmative of the issue must have the preponderance of evidence or he must fail. That as the parties were equally interested and alike respectable, the evidence of the defendant balanced and rendered nugatory that of the plaintiff. On this question alone, judgment ordered for the defendant.

John Gillett, for plaintiff.

Anson B. Moore, for defendant.

SMITH, J.—There are two questions arising in this case, each of which must be answered in the affirmative to entitle the plaintiff to recover. There must be shown a warranty and a breach of the warranty. The first question to decide is, was there a warranty; if there was not, then that is the end of the case. The mass of evidence given upon the subject of the soundness or unsoundness of this horse, it is not necessary to consider or pass upon in this case in the view I take of the matter, having found upon the question of warranty in the negative.

It is a well established rule of law that he who has the affirmative, must establish it by a preponderance of proof, otherwise he fails in law to make out his case. Upon the question was there a warranty, the plaintiff has the burthen and must establish it by furnishing the preponderance. The plaintiff swears unqualifiedly and explicitly to a warranty. The defendant as unqualifiedly and explicitly swears there was not. These two young men told their stories with apparent candor and honesty. Each, so far as anything appeared on the trial, is credible, and so far as I could discover gave his evidence with sincerity and candor. One or the other is mistaken. The defendant's statement in regard to what the conversation was at the time of the purchase is not in any way corroborated. Is the statement made by the plaintiff corroborated? If it is, from what has been stated above, he is entitled to recover, providing there was a breach. I find no

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evidence in the case corroborating the plaintiff in his statement, that the defendant said at the time of the purchase "his horse was sound and all right." This rests upon the plaintiff's evidence alone. But it is claimed by plaintiff's counsel that the defendant swears he had no recollection that he told the plaintiff the horse was sound when he "took him." If this evidence referred to the witness' recollection of what was said at the time of the purchase or exchange or during the negotiation, then the case would be entirely changed; it would be a positive statement by the plaintiff against a mere want of recollection of the defendant. This want of recollection refers to the time when the plaintiff *took* the horse. It is not claimed by the plaintiff in his evidence that anything was said at this time about a warranty. The defendant would not probably recollect what was said at the time he left the horse for training, as nothing was said at that time by which he would assume any responsibility, there being then no negotiations between the parties until some time after, and hence this want of recollection proves nothing one way or the other. It is claimed also by plaintiff's counsel that the evidence of his witness, Risley, shows there was a warranty. The difficulty here is that nothing was said before Risley as to what the conversation was at the time of the sale, no admission before Risley that the defendant made a warranty, or that he used any words amounting to a warranty; in short, nothing said before Risley upon the *subject* of the conversation, *which*, it is claimed, constitutes the warranty. We have therefore no evidence one way or the other, outside the statement of the parties as to what that conversation was. Stress is laid upon the statement of defendant before Risley, that the "horse was all right at the time of the sale." But this evidence, fairly construed, amounts to no more than an expression of an opinion; it is in no sense an admission of what the defendant did say at the time of the sale. Indeed, taking the evidence of Risley as a whole, it rebuts the idea of a warranty, as he said in that conversation he would not do

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anything, provided his eyes didn't get any better ; but it in no sense follows from this conversation that he did not in fact warrant the horse, nor does it follow that he did. The mind is still left without any additional light upon the sworn statements of the parties, and there balancing each other, the plaintiff, under the rule above referred to, has failed to make a case of warranty. For the reasons above stated, if correct, the defendant is entitled to judgment for his costs of this action.

Judgment ordered accordingly.

SUPREME COURT.

SHEPARD TAPPEN agt. ISAAC W. CRISSEY, as comptroller of the city of Troy.

Injunction — in action under act for the protection of taxpayers (Laws of 1881, chapter 531), what bond to be given — What must be shown to entitle party to injunction.

In an action brought by a resident and taxpayer of a municipal corporation against the comptroller of such corporation, under the act for the protection of taxpayers (*Laws of 1881, chap. 531*), the plaintiff must, upon the commencement of such action, give a bond as in such act specified.

Such bond must be in the form prescribed by the act, and must be under seal.

A compliance with sections 620, 621, of the Code of Civil Procedure as to security, does not obviate the necessity of complying with the provisions of this statute.

Where a motion is made to dissolve an injunction granted under the act of 1881, without the giving of such a bond upon the commencement of the action, the court, at special term, has power in a proper case to permit such bond to be filed *nunc pro tunc*.

If the court intervene to enjoin an officer in what he claims to be his official duty, a plain case should be established by the party asking such interference. It is not sufficient for the plaintiff in such an action to show that the act he seeks to enjoin is one of doubtful propriety.

Where, on a motion to dissolve an injunction which had been granted restraining the defendant, who is the comptroller of the city of Troy,

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from countersigning any draft or drafts which might be drawn for the purpose of paying the police force of the city of Troy, of which John McKenna was the superintendent, and from countersigning any draft or drafts which might be drawn for the purpose of paying the police force of said city or any part thereof, signed by police commissioner Cavanaugh and police commissioner Hannan, until the further order of the court, the plaintiff, in support of the injunction, presented a case showing a doubtful question as to which of the two bodies of men claiming to be the police force of the city of Troy, is the legal one:

Held, that such doubt is not sufficient to justify the court in declaring, by its order maintaining the injunction, that the defendant was about to do an illegal official act, and waste or injure the property, funds or estate of the municipal corporation of which he is an officer.

Special Term, January, 1883.

MOTION upon an order to show cause to vacate an injunction.

R. A. Parmenter, for motion.

Henry A. Merritt, opposed.

WESTBROOK, J. — On the 30th of December, 1882, the county judge of the county of Rensselaer granted an injunction restraining the defendant, who is the comptroller of the city of Troy, from countersigning any draft or drafts, which might be drawn for the purpose of paying the police force of the city of Troy, of which John McKenna was the superintendent; and from countersigning any draft or drafts which might be drawn for the purpose of paying the police force of said city or any part thereof, signed by police commissioner Cavanaugh and police commissioner Hannan, until the further order of the court.

Such injunction was granted upon the complaint of the plaintiff, Shepard Tappen, who is a resident of and taxpayer in the city of Troy, and had paid taxes in said city for one year previous to the commencement of the action upon assessments exceeding \$1,000 in amount. The action was brought under chapter 531 of the Laws of 1881, entitled: "An act for the protection of taxpayers." Upon granting the injunction

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the plaintiff gave an undertaking in the form prescribed by section 620 of the Code of Civil Procedure, but did not furnish a bond as required by chapter 531 of the Laws of 1881, under which the action was brought.

Upon an affidavit showing that the bond required by the act of 1881 had not been given, and that by the injunction granted the defendant was restrained from countersigning drafts as comptroller of the city, in payment of the services of the acting police force of the city of Troy, of which John McKenna was, and for more than a year and a-half past had been, the superintendent, he obtained an order from Mr. justice Ingalls requiring the plaintiff to show cause why the injunction granted by the county judge should not be dissolved and vacated.

The defendant now moves to dissolve such injunction upon two grounds, first, that the bond required by the act of 1881 has not been given; and second, that the complaint fails to show that if the defendant should countersign the drafts, which he is forbidden by the injunction to countersign, any injury would result to the taxpayers of the city of Troy.

These grounds will be briefly considered in the order in which they have just been stated.

The act of 1881 is positive and mandatory in its requirements that a bond shall be given. In direct words it requires the person or persons who commence an action thereunder to give a bond as is in such act specified, upon "the commencement of such action," and also requires that "such bond shall be filed in the office of the county clerk of the county in which the action is brought, and" that "a copy shall be served with the summons in such action."

The counsel for the plaintiff upon the argument of this motion, scarcely claimed that the undertaking given when the injunction was allowed, was a sufficient compliance with the act of 1881. It clearly was not, because such undertaking was not in the form which the act of 1881 prescribes for the bond, and it was not under seal, which was necessary to make it a "bond" such as the act of 1881 requires. A reference also to the Code

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of Civil Procedure (*secs.* 620, 621) shows that a compliance with such sections as to security, does not obviate the necessity of complying with the provisions of other statutes passed to control the proceedings in special cases, and therefore it must be held that the injunction granted by the county judge without such a bond cannot be sustained.

The counsel for the plaintiff, however, asks that he may be allowed now to give a bond such as the act of 1881 prescribes. As an original question, I should have great doubt as to the power of the court to permit such bond to be now filed and approved. The statute of 1881 seems to be mandatory as to the giving of such bond upon the commencement of the action, and that it shall be filed in the office of the clerk of the county in which the action is brought and that a copy thereof shall be served with the summons in the action.

This, however, is perhaps not now an open question, as the general term of this department held last September, that the court at special term, when a motion was made to dissolve an injunction granted under the act of 1881 without the giving of such a bond, had power to permit such bond to be filed *nunc pro tunc*. Following such decision it must now be held that the application to file a bond in this action *nunc pro tunc* should be granted, provided the case made upon the papers for the continuance of the injunction, was free from reasonable doubt. The power to amend in so vital a particular should be sparingly exercised, and only in a clear case. Is the present such a case?

This brings us to the second ground upon which this motion is made, to wit: That the plaintiff has failed to show that the continuation of the injunction is necessary to protect the property of the municipality of which the defendant is an officer. The act is entitled "an act for the protection of taxpayers," and allows an action of the character of the present to be brought only for the purpose of preventing an "illegal official act," or "to prevent waste or injury to any property, funds or estate of a municipal corporation."

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Does the complaint show any such cause of action? Very clearly if the court intervenes to enjoin an officer in what he claims to be his official duty, a plain case should be established by the party asking such interference. It is not sufficient for the plaintiff in such an action to show that the act which he seeks to enjoin is one of doubtful propriety.

The right course of official action is oftentimes difficult to determine, but when difficult, an official should be left to pursue his own best judgment unless the court can clearly see that in so doing he will violate the laws, or that the taxpayers whom the action seeks to protect may be injured.

The case which the complaint in this action presents is, that there are now in the city of Troy two separate and distinct police forces, each claiming to be the regular and legal police force of such city. It admits that the force which the injunction prevents the comptroller from countersigning warrants or drafts to pay, is acting as such, and have not yielded up nor retired from their positions; and also that the parties who have drawn the drafts which the defendant is prevented by the injunction from countersigning are acting as police commissioners of such city.

It is true that the complaint does aver that such police force is not the legal police force of the city and that the persons acting as such commissioners of police, and the person acting as superintendent thereof, do not legally hold the offices, the duties of which they exercise; but the fact that such police force is discharging the duties appertaining thereto, and that such commissioners of police and superintendent are also discharging the duties belonging to their several offices, is admitted; and the affidavit presented by the defendant expressly and directly avers that the drafts which the defendant is enjoined from countersigning are properly and legally drawn "in payment of the acting police force of the city of Troy, over which one John McKenna now is, and for more than a year and a-half last past has been the superintendent."

It is impossible upon the papers now presented to deter-

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ine which of the two bodies of individuals claiming to be the police force of the city of Troy is the legal one ; and equally impossible to determine who are the legal commissioners of police of the city, and who the legal superintendent of police is.

If, owing to the uncertainty attending these questions, the payment of either might subject the taxpayers to loss, it would be the duty of the court to interfere. No such case, however, is presented, for the fact, which is admitted in the complaint, that the force which the defendant proposes to have paid is in fact discharging the proper duties incident to the police force, and that the commissioners and superintendent of police, whose orders they obey, are also in possession of such offices, would protect the city in payment. If such payment is made the other persons claiming to be the regular police force and the commissioners of police and the superintendent of police would not be entitled also to receive and recover from the city payment for the same services.

It has been repeatedly held, both in this court and in the court of appeals, that where the rightful incumbent of an office has been deprived of its possession by another, who has discharged the duties of such office and received compensation for so doing, that the person entitled to the possession cannot recover compensation for his services from the city (*Smith agt. The Mayor of New York*, 37 *N. Y.*, 518 ; *Mott agt. Connelly*, 50 *Barb.*, 516).

It is apparent, therefore, that the taxpayers of the city of Troy cannot be subjected to loss by the defendant countersigning the warrants which he is enjoined from signing by the injunction granted in this case.

It is possible, that if the defendant should countersign the drafts which the injunction forbids him from countersigning, that the persons, who compose what the plaintiff avers to be the legal police force of such city, may be subjected to loss, but this fact does not give the plaintiff any standing to maintain this action. It can only be maintained upon the ground that the doing of the act by the defendant which the plaintiff

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seeks to enjoin, will waste or injure the property of the city of Troy. Such a case the papers before me do not present.

The most that can be urged and said in behalf of the injunction is, that the plaintiff has presented a case showing a doubtful question as to which of the two bodies of men claiming to be the police force of the city of Troy is the legal one. Such doubt is not sufficient to justify the court in declaring by its order maintaining the injunction, that the defendant was about to do an "illegal official act," and waste or injure the property, funds or estate of the municipal corporation of which he is an officer.

Courts in dealing with questions of this character, should act with care and caution. The officers of a municipal corporation are presumed to act upon the obligation of duty as seen by them to be right. They are chosen for the very purpose of exercising their best judgment in the discharge of their duties. The presumption that they so act is not to be overcome upon slight grounds, nor upon proof which is not entirely clear. Interference by courts may oftentimes in such cases be productive of great injury both to individuals and the municipality.

The case before me is not such an one as in my judgment warrants judicial interference by a preliminary injunction; neither the facts nor the necessary parties are before me to a proper determination of the question which is the legal police force of the city of Troy.

The court being unable from the papers and parties before it, to determine such question, and being unable to see that the taxpayers of the city of Troy will suffer an injury by the defendant doing the acts which he is enjoined from doing, the injunction granted by the county judge must be dissolved and the defendant left unhampered and unrestrained by judicial action from doing that which he, governed by the light which he may obtain, seems to be his official duty in the premises. He is a sworn officer of the city of Troy, responsible to those whom he represents for a faithful discharge of his

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duties, with better opportunities of judging as to his duties than the court has upon *ex parte* statements and proofs.

In conclusion it is proper to state that a laborious and busy circuit, which commenced immediately after the argument of this motion, has prevented an earlier decision.

SUPREME COURT.

ALICE BUCKINGHAM, as executrix of the last will and testament of **JAMES HORNER**, deceased, and as trustee under said will for **SUSAN HOENER**, agt. **ERASTUS CORNING** and **ANDREW KIRKPATRICK**, as receiver of the partnership estate of **JAMES HORNER & Co.**

Borrower—Usury—Relief in equity—Tender of amount borrowed—Construction of statute.

A legatee, devisee or executrix of a "borrower," is not a "borrower," within the usury laws, and cannot maintain an equitable action for relief against a usurious mortgage, without a tender before suit brought of the sum borrowed.

The rule of the construction of this statute, examined and explained.

Special Term, October, 1881.

DEMURRER to complaint. The judgment of the special term, rendered upon the demurrer in this case, was affirmed by the general term, which adopted the following opinion of the special term (*S. C.*, 26 *Hun*, 473). The court of appeals affirmed the judgment of the general term, March 6, 1883.

Amasa J. Parker, for defendant Corning.

Theodore W. Dwight, for plaintiff.

VAN VORST, J.—This action is brought to have a bond and mortgage declared to be void for usury, and that it be delivered up and canceled.

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The defendant Corning demurs to the complaint, first, upon the ground that there is a defect of parties, and second, because it does not state facts sufficient to constitute a cause of action. The defect in this latter regard being, as is claimed, that the complaint does not allege a tender of, or an offer to pay the sum borrowed, with the interest thereon.

An examination of the complaint shows that the plaintiff is the sole residuary devisee and legatee, under the last will and testament of James Horner, deceased, and that she is the sole executrix and trustee under such will. A portion of the residuary estate she holds in trust for her sister Susan Horner.

The bond and mortgage which are sought to be annulled, were executed by James Horner, the plaintiff's testator, and James Ludlum, on the 23d day of August, 1866, to Erastus Corning, since deceased. At the time of the execution and delivery of these obligations, Horner and Ludlum, the mortgagors, were partners, doing business in the manufacture and sale of steel in New York and New Jersey, under the firm name of James Horner & Co. The lands mortgaged were situated in the state of New Jersey; they had been acquired with copartnership money, and were owned by the partnership.

The money, which the bond and mortgage were given to secure, had been loaned by Erastus Corning in his lifetime to the firm of James Horner & Co., upon an agreement and terms that were usurious. The firm of James Horner & Co was continued until its dissolution, through the death of James Horner, in June, 1874.

Ludlum, as surviving partner, managed the affairs for a time, as such, but by a decree of the court of chancery of the state of New Jersey, he was afterwards appointed receiver of all the property of the firm. But in the year 1879 he was removed from his office as receiver, and the defendant Andrew Kirkpatrick was appointed receiver in his place, and has as such become vested with all the property and estate of the late firm, and is engaged in winding up its affairs, which are still unsettled.

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The bond and mortgage are now held and owned by the defendant Erastus Corning, the son of the mortgagee, which came to him from the estate of his father.

The defendant Kirkpatrick, before the commencement of this action, had been requested to bring this suit, as receiver, for the benefit of the partnership estate, but had refused, and the plaintiff sues for the benefit of all concerned.

I shall consider the objections presented by the demurrer in the order inverse from that in which they are stated; and that involves the principal question, as to whether the complaint sets forth a cause of action.

Although the lands covered by the mortgage are situated in the state of New Jersey, yet the contract was made in this state, and the money was payable here, and the laws of this state upon the subject of usury attached to this transaction, and must control in the disposition of the cause (*Cope agt. Alden*, 53 *Barb.*, 350; *Anderson agt. Torrey*, 14 *N. J. Eq.*, 355; *Dolman agt. Cook*, 14 *N. J. Eq.*, 56).

It is urged by the learned counsel for the defendant, under these grounds of demurrer, that the complaint is fatally defective for its omission to allege that the plaintiff had tendered, before suit brought, the sum actually borrowed, with the interest thereon.

The complaint alleges no such tender, and no offer to pay any sum is made therein.

If such tender was necessary, this ground of demurrer is well taken, for the maxim which obtains in equity, that he who would have equity must do equity, has been applied to cases of this character (*Allenton agt. Belden*, 49 *N. Y.*, 373, 377; *Story's Equity Jurisprudence*, sec. 304).

The usury laws of this state have, in effect, abrogated this rule of equity in so far as it relates to any "borrower of money," goods or things in action, and provides that it shall not be necessary for him to pay, or offer to pay, any interest on the sum or thing, as a condition of granting relief to the borrower, in any case of usurious loans forbidden by the

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statute (2 *R. S.* [6th ed.], 1165, 1166, *secs.* 8, 13). But with this exception in favor of the "borrower," the rule and practice in equity remains as it was before the statutes above mentioned.

The question then arises, is the plaintiff then a borrower within the section of the statute above cited?

The statute is both remedial and penal. In so far as it partakes of the former quality, it is entitled to a liberal construction; but regarded in the light of its penal character, it should be strictly interpreted and applied. In so far as the statute extends immunity to a borrower from tendering the amount received, as an incident to equitable relief, the word borrower should be taken in its accustomed sense and be limited to the one who borrows the money. Within such rule the plaintiff is not included. She prosecutes as a devisee, trustee and executor under the will of one of the borrowers. In *Wheelock agt. Lee* (64 *N. Y.*, 242), *ANDREWS, J.*, says that the word "designates only the party bound by the original contract."

This subject has been much discussed in the courts, and the general current of decision is in favor of taking the word strictly, as is shown by the following cases: *Post agt. The Bank of Utica* (7 *Hill*, 391); *Vilas agt. Jones* (1 *N. Y.*, 274); *Allenton agt. Belden* (49 *N. Y.*, 373); *Marsh agt. House* (13 *Hun*, 126); *Rexford agt. Widger* (2 *N. Y.*, 131); *Schermerhorn agt. Tallman* (14 *N. Y.*, 94).

It was held in *Rexford agt. Widger*, and in *Schermerhorn agt. Tallman*, that a grantee of the mortgagor was not included under the word borrower. That a devisee of the mortgagor is not a borrower was decided in *Marsh agt. House*; and *Wheelock agt. Lee* holds that an assignee in bankruptcy is not a borrower. *Allenton agt. Belden* holds that a surety for the borrower is not a borrower.

In *Vilas agt. Jones*, *BRONSON, J.*, says: "There is no solid ground for saying that the word borrower includes one who did not borrow."

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Under the authority of *Marsh agt. House*, the plaintiff, as a devisee under her father's will, cannot maintain this action without a tender. And if a devisee of the mortgagor is in that condition, because not a borrower, the plaintiff, as a trustee under the will, for her sister, as to a portion of the land covered by the usurious instruments, can have no greater right. One interest she takes absolutely to herself, the other she holds in trust.

No case in terms holds that the personal representatives of the mortgagor are included in the word borrower, or are entitled to the immunity conferred by the act, except that of *Cole agt. Savage (supra)*.

But that case, in so far as it announces a rule of construction, is greatly weakened by subsequent adjudications.

In addition, the disposition of that case did not necessarily call for the decision of that question.

A devisee takes the land burdened with the mortgage, and is concerned in ridding it of the incumbrance, and a grantee is in the same condition. Both are in privity with the mortgagor, but they are not parties to the usurious contract, although a surety is, but neither of them is within the category of borrowers. The office of executor has respect to the personal estate of the testator, and is not necessarily charged with any duty as to the land.

The executor, it is true, may be sued on the usurious obligation, and so may a surety, and if the latter is obliged to pay, he may have redress from his principal or out of his estate.

Liability on the contract does not, therefore, determine the question.

I think that the rule of construction and application of the statute to be gathered from the decisions, which excludes devisees, grantees and sureties from the word borrower, and the immunity extended to him, also shuts out the personal representatives of the borrower, and limits the word to its accustomed sense. The statute means simply that the borrower himself, in his lifetime, may rid his lands of the usuri-

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ous incumbrance, by a suit in equity, without a tender of the amount received by him.

If he does not avail himself of this dispensation in his favor, the right to do so dies with him.

Had the legislature intended that this peculiar remedy should be extended further, so as to embrace the representatives of the borrower, or those in privity with him, it is to be presumed it would have said so plainly. The usury act was an important work of legislation, and we may well suppose that it was deliberately and carefully prepared. In the interpretation of statutes, it is wisest to judge that the legislature used the best, as well as the shortest, mode of expressing its meaning, and that when the words used are clear, they were intended to be taken in their accustomed sense.

While exposition may enlarge the operation of a statute within its imposed limits, judicial construction cannot with propriety extend or abridge a law so clearly expressed as the one under consideration. It may be asked why, in reason, may not a privilege of this nature, conferred upon a borrower, be enjoyed by his devisee, grantee, surety and personal representatives? The answer is, that the law which creates this privilege itself so limits it. The rule above indicated also logically excludes the receiver of the partnership property and assets of James Horner & Co. from bringing the action without a tender.

It is not important in this connection to refer to the powers of a receiver with respect to the property to which he has succeeded, nor as to his duties in paying the debts of the firm. An assignee in bankruptcy has kindred powers and duties, and each takes his office through the judgment of a court.

If the executor who holds his office by the appointment of the testator is properly excluded from the word borrower, such receiver cannot be included.

The result reached, with respect to this ground of demurrer, is fatal to the complaint, and as it covers the whole case as presented, it is needless to consider any other ground.

Bowes *et al.* agt. New York Christian Home.

There must be judgment for the defendant on the demurrer, with liberty to the plaintiff to amend in twenty days, on payment of costs.

N. Y. SUPERIOR COURT.

JOHN J. BOWES *et al.* agt. THE NEW YORK CHRISTIAN HOME,
&c., *et al.*

Mechanics' lien law — Notice of lis pendens filed on the ninety-first day after notice of lien when the ninetieth day falls on Sunday, is of no effect — Lien cannot be revived where it ceases by lapse of time.

Under the mechanics' lien law of 1875, which is applicable to the city of New York, a notice of *lis pendens*, filed on the ninety-first day after notice of lien, though the ninetieth day fell on a Sunday, is of no effect, and the person filing the *lis pendens* has no standing in court as a lienor. All conditions of the statute must be strictly complied with, or the lien will be lost.

Where a lien ceases by lapse of time, it cannot be revived. It becomes wholly void.

Special Term, March, 1883.

FREEDMAN, J. — The sub-contractor, James V. Donovan, who claims affirmative relief as a defendant under a lien filed by him, filed his notice of lien July 24, 1882, and a notice of *lis pendens* on October 23, 1882, and the question submitted for decision is whether the notice of *lis pendens* was filed in time.

The court of appeals having decided that the act of 1880 does not apply to the city of New York (*McKenna agt. Edmondstone*, 64 *How.*, 461), the question submitted must be determined under the act of 1875 (*chap.* 379), which provides that no lien shall bind the property longer than ninety days after it is filed, unless within that time an action be commenced and a notice of *lis pendens* filed and an entry of the notice made on the lien docket.

In the case at bar the notice of *lis pendens* was filed on the ninety-first day after the filing of the notice of lien.

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It is contended, however, that as the 22d day of October, 1882, fell on a Sunday, the filing of the notice on the following day (Monday) was in time.

If this question were to be determined according to the rules regulating the computation of time for the service of pleadings, the contention would be well founded (*Borst agt. Griffin*, 5 *Wend.*, 84; *Graham's Pr.* [2d ed.], 220; *Code of Civ. Pro.*, sec. 520).

The same result would follow if the question were to be determined according to the rule regulating the computation of time for the publication of legal notices presented by section 788 of the Code.

But the question is one of construction of a particular statute. The statute is a special act applicable only to a part of the State. It gives a new remedy, and therefore a party invoking the benefit of it must bring himself strictly within its provisions. It does not say that a lienor shall have ninety days for the filing of his notice of *lis pendens*. The language is that no lien shall bind the property unless certain things are done within ninety days. Under these circumstances the notice of *lis pendens* should have been filed on Saturday, October 21, 1882 (*The People ex rel. Pugsley agt. Luther*, 1 *Wend.*, 42, and cases there cited).

Section 8 of the statute under consideration is obligatory on all lienors. It makes no distinction as to the ninety days required. All the conditions of the statute must be strictly complied with, or the lien will be lost (*O'Donnell agt. Rosenberg*, 14 *Abb. N. Y.*, 59; *Benton agt. Wickwise*, 54 *N. Y.*, 226).

Where a lien ceases by lapse of time, it cannot be revived. It becomes wholly void (*Weyer agt. Beach*, 79 *N. Y.*, 400; *Poersopke agt. Kedenburg*, 6 *Abb. [N. S.]*, 172; *Noyes agt. Burton*, 17 *How. Pr.*, 449).

For the reasons stated, the defendant Donovan has no standing in court as a lienor, and having no standing as such, he has no standing at all in this action. His claim for affirmative relief must be dismissed.

N. Y. Life Ins. and Trust Co. agt. The Rector, &c., St. George's Church.

SUPREME COURT.

THE NEW YORK LIFE INSURANCE AND TRUST COMPANY, as trustee of JULIA A. LIVINGSTON, &c., agt. THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF ST. GEORGE'S CHURCH in Flushing.

Lease for term of years with covenants of renewal — Option of — When delay in expressing option does not constitute laches — Honest mistake or ignorance of facts is good ground for equitable interference.

Where plaintiff, the assignee of a long lease containing a covenant to renew, who omitted by accident or mistake to give notice of his option until thirty-six days after the contract time, sued to be relieved from a forfeiture of the lease, and it appeared that, prior to the alleged forfeiture, he had a vested interest in the property, to the extent at least of \$30,000, and plaintiff continued in possession, and defendant received the rent after the expiration of the term:

Held, that as time was not originally of the essence of the contract, and was not engrafted into it by subsequent notice, and the delay on plaintiff's part in expressing the option was not so great as to constitute laches, the plaintiff is entitled to judgment, requiring defendant to execute a renewal of the lease.

Special Term, February, 1883.

ON December 30, 1818, the defendants executed and delivered to James Boggs a lease of the lot of land now known as No. 116 Chambers street, in the city of New York, for the term of sixty-three years, to commence September 25, 1818, at an annual ground rent of \$150, payable half yearly, on the twenty-fifth days of March and September in each year during the term.

The lease was recorded in the office of the register of the city and county of New York, February 10, 1819, in liber 134 of conveyances, page 306, and containing covenants on the part of the lessor to grant a renewal thereof for a further term of twenty-one years, upon receiving notice in writing from the lessee prior to September 25, 1881, of his intention

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to renew, and in case renewal was not required, the lessee was allowed twenty days after the expiration of the term to remove the buildings standing on the demised premises.

The plaintiff, as trustee, has acquired and now owns the legal title and interest of the original lessee, and is now in possession (through its tenants) of the premises, upon which buildings have been erected which are now worth \$30,000.

The term of sixty-three years reserved in the lease expired September 25, 1881, without notice from the plaintiff of its intention to renew.

On October 17, 1881, the defendant received the six months' ground rent of the premises up to September 25, 1881.

On November 1, 1881, the plaintiff gave notice in writing of its election to renew the lease, and therein stated that such notice was not given prior to September 25, 1881, because the plaintiff had been misled as to the time when the lease expired. To this notice the defendant made reply that the lease was at an end, and no renewal thereof would be given.

Whereupon this action was commenced to relieve the plaintiff from a forfeiture of the lease, and for a judgment declaring its covenants still in force, and that the defendant execute a renewal thereof in pursuance of its terms.

Joseph H. Choate and Betts, Emmet & Robinson, for plaintiff.

John H. Wilson, for defendant.

LARREMORE, J. — The defendant's counsel struck the keynote of this controversy in anticipating plaintiff's position — that generous dealing by a religious incorporation with a trustee of an express trust, would be expected and enforced.

Prior to 1880 neither party had a copy of the lease. The only papers then in plaintiff's possession were the assignment, dated December 2, 1873, and defendant's consent thereto, dated December 20, 1873, both of which refer to the date of

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the lease (December 30, 1818), but not to the commencement of the term thereby granted (September 25, 1818).

The plaintiff was evidently misled by the recital in the assignment into the belief that the lease did not expire until December 30, 1881.

In the absence of any express intention on its part, it cannot be reasonably presumed that the plaintiff would knowingly surrender so valuable an interest as it had in this lease without adequate compensation. Neither should its honest mistake of a fact, under all the circumstances, be regarded as laches.

Without any imputation of unfairness on the part of the defendant, the acts and statements of its collector were calculated to mislead the plaintiff as to the date of the expiration of the lease.

Time was not originally of the essence of the contract. It was not engrafted into it by subsequent notice, and the delay on plaintiff's part in expressing its option was not so great as to constitute laches (*Myres agt. De Mier*, 4 *Daly*, 343; *affirmed*, 52 *N. Y.*, 647; *Hubbell agt. Van Schoening*, 49 *N. Y.*, 326).

I cannot assent to the proposition that there was no mutuality in the covenant to renew. The case mainly relied upon to sustain it (*Codding agt. Walmsley*, 1 *Hun*, 585) fails to substantiate the point. That was an action to enforce specific performance of a contract for the sale of real estate, based upon an option to purchase reserved in a lease within a specified time upon the payment of a specified sum of money, and the assumption of certain liabilities as a condition of the purchase, which was not complied with within the time prescribed. As the plaintiff failed to show a performance of the condition, the court properly held that he had not acquired any vested interest in the property, and the contract was unilateral.

The principle thus established falls far short in its application to a case in which, prior to the alleged forfeiture, a party

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having a vested interest in property to the extent at least of \$30,000 omits by pure accident or mistake to give notice of his option until thirty-six days after the contract time (*Van Campan agt. Knight*, 65 *N. Y.*, 580; *see, also, White agt. Schuyler*, 31 *How. Pr.*, 38; *Ex parte Hunter*, 1 *Ed. Ch.* 1).

Admitting the theory as stated by the lord chancellor and justices in *Hughes agt. Metropolitan Railway Company* (*Eng. Law Report Appeal Cas.* [vol. 2], 439), that a court of equity has no right to grant relief by way of mercy, or merely to save a forfeiture, all the authorities concede that an honest mistake or ignorance of facts is a good ground for equitable interference (*Henry agt. Tupper*, 29 *Vt.*, 358; *Rawstorne agt. Bentley*, 4 *Brown's Ch. R.*, 415).

The plaintiff continued in possession and the defendant received the rent after the expiration of the term. Such continued possession shows an intention to claim a renewal of the lease (*Holsman agt. Abrams*, 2 *Duer*, 446), and although it was not a literal compliance with the contract which required a written notice within a specified time, yet in the absence of gross laches or willful neglect, it clearly meets the ruling of lord REDESDALE, in *Lennon agt. Napper* (2 *Sch. & Lef.*, 682), that where a party has acted fairly, and no injury has been done to the other party by a failure to perform within the time prescribed, equity will grant relief (*Maxwell agt. Ward*, 11 *Price*, 16).

In *Wheeler agt. Connecticut Mutual Life Insurance Company* (82 *N. Y.*, 543), it was the peculiar nature of the contract of life insurance that gave emphasis to the decision. It is not applicable or controlling in the present case.

The defendant knew that plaintiff's option expired on September 25, 1881, and while under no legal obligation to give notice of that fact, equity in all candor asks, if it was the intention to make time of the essence of the contract, and assume the ownership of such valuable interests, why was the plaintiff left without notice of such intention?

As a corporate body, the defendant rested and had legal

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authority to rest upon its rights. But when it appears that a rigid enforcement of its demand would work substantial injustice, equity intervenes and carries out the contract according to its original intention.

The plaintiff is entitled to the relief, and judgment is ordered as asked for in the complaint.

SUPREME COURT.

HAMSON S. MATTESON, respondent, agt. ALVEN H. HALL,
appellant.

Justices court—Appeal to county court—When appellant may demand new trial in appellate court—What order of county court appealable—Code of Civil Procedure, sections 1842, 3062, 3068, 3069, 2940, 2949.

Defendant served in time regularly a notice of appeal from a justice's judgment, to the county court, and in the notice of appeal inserted the words, viz. : "Said appellant hereby demands a new trial in the appellate court." Thereupon, the plaintiff, upon an affidavit and notice of motion, asked the county court to dismiss the appeal. The notice of motion points out no irregularity or grounds for dismissing the appeal to the county court. But the affidavit used upon the motion referred to the pleadings in the justice's court, and added that the plaintiff was informed by counsel, and verily believe that a new trial of such action could not be claimed or had in the county court, and that said appeal is unauthorized by law, and cannot be sustained. On motion of plaintiff the appeal was dismissed, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of the motion. On appeal from such order:

Held, first, that the order made by the county court, dismissing the defendant's appeal to that court, is appealable.

Second. No sufficient reason was presented to the county court for dismissing the appeal, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of motion.

Third. The appeal to the county court was regular, and the appellant was entitled to have either a new trial in that court, or a hearing and consideration by the county court of the questions of law presented by the appeal.

Fourth. The defendant had, by his answer, denied all the allegations of

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the complaint, and that formed an issue upon which he was entitled to have his appeal determined without an amendment, even if the second branch of his answer was defective. This would be so whether there was a new trial in the county court or simply a hearing of the appeal upon the questions of law.

Fourth Department, General Term, March, 1882.

James A. Ward, for appellant.

H. Clay Hawes, for respondent.

HARDIN, J.—Jefferson county court, upon the 19th day of September, 1881, granted an order on the motion of the plaintiff, whereby the appeal taken by defendant, from a judgment rendered by a justice of the peace, was “dismissed unless the defendant amend his answer and pay plaintiff’s attorney ten dollars costs of the motion.” Defendant appeals from such order.

The defendant served in time, regularly, a notice of appeal to the county court, August 13, 1881, and in the notice of appeal inserted the words, viz., “said appellant hereby demands a new trial in the appellate court.”

Thereupon, the plaintiff, upon an affidavit and notice of motion, asked the county court to dismiss the appeal. The notice of motion points out no irregularity or ground for dismissing the appeal to the county court of Jefferson county. But the affidavit used upon the motion refers to the pleadings in the justices’ court, and adds that the plaintiff is informed by counsel, and verily believes that a new trial of such action could not be claimed or had in the county court, and that said appeal is unauthorized by law, and cannot be sustained.”

1. The order made by the county court, dismissing defendant’s appeal to that court, is appealable (*Chap. 135 of the Laws of 1881*).

2. No sufficient reason was presented to the county court for dismissing the appeal, “unless the defendant amend his answer and pay plaintiff’s attorney ten dollars costs of motion.”

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3. The appeal to the county court was regular, and the appellant was entitled to have either a new trial in that court, or a hearing and consideration by the county court of the questions of law presented by the appeal (*Code of Civil Pro.*, secs. 3062, 3068; *Houghton agt. Kenyone*, 38 *How. R.*, 107, 110).

If the case is one in which the appellant is not entitled * * * to a new trial in the appellate court, *as prescribed* in section 3068, the appeal may be brought to a hearing in the appellate court. Then section 3063 provides that in a case specified in the last section, *the appeal* must be heard upon the original papers." * * "The appellate court *must render judgment* according to the justice of the case." * *

"It may affirm or reverse the judgment of the justice in whole or in part." * * If the defendant is not entitled to a new trial, the county court was in duty bound to obey the provisions we have quoted from section 3063.

4. The defendant had by his answer denied all the allegations of the complaint, and that formed an issue upon which he was entitled to have his appeal determined without an amendment, even if the second branch of his answer was defective.

This would be so whether there was a new trial in the county court or simply a hearing of the appeal upon the questions of law.

5. The plaintiff seems to have supposed that there could not be a new trial in the county court, as there was no formal demand for judgment in the answer of the defendant for more than fifty dollars. That answer did allege an indebtedness of the plaintiff to the defendant in a sum exceeding fifty dollars.

That answer was not required to be in any particular form in justices' courts (*Code Civ. Pro.*, sec. 2940).

Was it so expressed as to enable a person of common understanding to know what was intended? If good as a counter-claim, though no formal prayer is inserted for judgment. Do the words of section 2949 apply when it is

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declared that if the counter-claim "exceeds the plaintiff's demand, the defendant must have judgment for the excess or so much thereof as is due from the plaintiff." * * The language of section 3068, "where an issue of fact * * was joined before the justice *and the sum for which judgment was demanded by either party in his pleading, exceeds fifty dollars* * * the appellant may in his notice of appeal *demand a new trial in the appellate court, and thereupon he is entitled thereto,* * *" is broad and differs in some respect from section 352 of the old Code.

In section 352, old Code, the language used as to claims for which judgment was demanded in general cases was, "shall exceed fifty dollars." Whereas the language used as to cases where the action was to recover the possession of personal property, it was that if the value of the property as assessed and the damages recovered shall exceed fifty dollars exclusive of costs.

The words *exclusive of costs* are left out of section 3068. And it may be considered an open question as to whether the rule which the old section prescribed as to one or the other class of cases has been enacted in section 3068.

If the "sum for which judgment was demanded" is to exceed fifty dollars as to damages, then the plaintiff in this case did not demand judgment for a sum which exceeds fifty dollars.

His demand was for the sum of fifty dollars besides costs.

For the reasons already stated we must reverse the order and therefore we do not pass upon the questions just alluded to, as it should first be presented to and determined by the county court.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

SMITH, P. J., and HAIGHT, J., concurred.

Matter of Attorney-General agt. Continental Life Insurance Co.

SUPREME COURT.

In the Matter of the ATTORNEY-GENERAL agt. THE CONTINENTAL LIFE INSURANCE COMPANY.

Insurance (Life)—When failure to pay premium causes policy to lapse. — What must be shown to relieve party.

Where a party failed to pay the premium upon his policy of life insurance which became due six months prior to the failure of the company and the appointment of a receiver :

Held, that if he wished to be excused from the consequences of his omission to perform his part of the contract he must at least show his readiness and willingness to perform, and that he refused performance upon the ground that the other party had broken the contract by allowing itself to become insolvent.

Special Term, March, 1882.

Wingate & Cullen, for receiver.

Davis, Work, Hilton & McNamee, for claimant.

CLAIM of George Coggeshall.

The plaintiff failed to pay the premium upon his policy in the Continental Life Insurance Company, which became due six months prior to its failure and the appointment of its receiver, and the receiver consequently claimed that his policy had lapsed. He offered evidence to show that at the time his premium became due the company was and had been for a long time previously actually insolvent, and claimed that such insolvency was, under the decisions, a breach of the contract of insurance between the company and its policyholders, and excused the latter from tendering their premiums. The case was a test case, the effect of which would, if allowed, have revived claims amounting to a very large number. The referee rejected the evidence and disallowed the claim. Exceptions were filed to his report, which were argued before judge WESTBROOK, who has rendered the following decision :

Kingman agt. Frank.

WESTBROOK, J.—There must be an order affirming the report. There is nothing in the case to show that the failure to meet the premium was because of the insolvency of the company. If the claimant wishes to be excused from the consequences of his omission to perform his part of the contract he must, at least, show his readiness and willingness to perform, and that he refused performance upon the ground that the other party had broken the contract by allowing itself to become insolvent. There is nothing to contradict the inference to be drawn from the failure to pay the premiums, that the claimant intended to abandon the insurance. Having failed to pay apparently because he saw fit to terminate the contract he is in no position to take a ground not then thought of and assert a demand long since abandoned.

SUPREME COURT.

ELBRIDGE A. KINGMAN agt. JETTE FRANK and GUSTAVE FRANK.

Husband and wife — Debtor's wife not liable in action by a creditor of husband after judgment and execution against him returned unsatisfied.

Money due from a wife to her husband, for services under an employment by her in her separate business cannot be reached in an action against the wife by a creditor of the husband, after a judgment and execution against him returned unsatisfied.

Special Term, March, 1883.

DEMURRER to complaint.

August Kohn, for demurrer.

John B. Leavitt, opposed.

VAN VORST, J. — The defendants, Jette and Gustave Frank, are husband and wife. The wife carried on business as a

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feme sole selling merchandise. The complaint alleges that on the 2d day of January, 1880, it was agreed by and between the defendants that the husband should be employed to manage her business and superintend the same, and buy and sell goods in the usual course of trade, and that the wife should give him as compensation for such services a weekly salary; that the husband had rendered the services, but that his wife had failed to pay him.

The money claimed to be due from the wife to the husband, \$1,000 and upwards, growing out of such employment and promise, is sought to be reached in this action by a creditor of the husband, after a judgment and execution against him returned unsatisfied.

The defendants demur to the complaint.

In opposition to the demurrer it is urged by the counsel for the plaintiff that the husband could have sued his wife at law, upon her refusal or failure to pay, and have recovered from her for his services, and that the judgment-creditor stands in his shoes, and may, through a receiver to be appointed herein or otherwise, do the same thing. I am referred to no case in this state, and I know of none, in which it has been decided that a husband can maintain an action against his wife upon such a promise and consideration.

But upon the other hand (*Perkins agt. Perkins*, 62 Barb., 531), the opinion in which was written by POTTER, J., an experienced and able jurist and commentator upon statutes, is decidedly against the propriety or lawfulness of such a suit, upon the grounds that neither by the principles of the common law, nor in virtue of any statute, could the husband sue his wife upon any such promise. The reasons for such conclusion, and, in fact, all that need be said upon that subject, will be found in judge POTTER's able opinion. But it is contended that the husband has some equitable rights, growing out of the nature of his service, and from the fact that his wife was carrying on a separate business, which could be enforced by him, and through him, the plaintiff. Equities in

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favor of a husband, where his wife has, by a proper instrument, or sufficient agreement, created a lien, general or specific, upon her separate estate, may, without doubt, be enforced by him in an appropriate action and form.

But such is not this case. The idea of any equitable lien or claim upon the wife's separate estate or property is, under the facts alleged in this case, vague and shadowy. Creditors have in some general sense an equitable right or claim upon their debtors' property, but that does not obviate the necessity of an action at law to establish the debt and the exhausting of legal remedies. The husband, I am sure, could not maintain any such action against his wife. He gets no such right of action from the married woman's acts, which were designed to protect her. It is clearly against the policy of the law that the peace of the marital relation should be disturbed by actions at law of such a character.

A specific lien upon her separate estate in favor of her husband, founded upon a good consideration, could be doubtless enforced thereout, but nothing more.

The creditor can certainly do nothing more than the husband could by way of enforcing this supposed claim, and I cannot see that he could do anything affirmatively through a suit against her. The services were general and founded upon a promise to pay therefor, made between persons who on account of their unity through marriage were not competent so to contract. The cases of *Kelly agt. Case* (18 Hun, 472); *Wood agt. Wood* (18 Hun, 350), and *Howland agt. Howland* (20 Hun, 472), and others of the same nature, are not inconsistent with the above.

These were efforts to recover specific property of the wife in suits by her against her husband. As the law gave her this property free from the control of her husband she has been allowed to recover its possession or its value.

I am of opinion that there should be judgment for the defendants on the demurrer.

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THE PEOPLE *ex rel.* CHARLES R. STILWELL, *agt.* THE NEW
YORK PRODUCE EXCHANGE.

*Costs—How allowed in mandamus—Code of Civil Procedure, section 2086—
Construction of.*

Where a peremptory *mandamus* is denied without an alternative *mandamus*, the court has no authority to award costs except as upon a motion.

Special Term, February, 1888.

AN application for a peremptory *mandamus* having been denied, the counsel for the respondent moved for an extra allowance and for costs as in an action. The motion was denied, the facts further appearing in the opinion.

W. R. Foster, Jr. (*Foster & Wentworth*), for respondent, for the motion. Under section 2086 of the Code, when a peremptory *mandamus* is denied, fifty dollars costs and disbursements should be granted, together with an extra allowance, as in an action, to be computed on the basis of the value of the property in controversy.

James B. Dill, Edward C. James (*Dill & Chandler*), for the relator, in opposition.

I. The court has no authority to award costs where an application for a peremptory *mandamus* is denied. This is a special proceeding. Section 3240 of the Code is limited to cases where the costs are not specially regulated by the Code. Section 2086 of the Code specially regulates the costs upon a motion for a *mandamus*. It omits, however, to provide for any costs or disbursements where a motion is denied. The respondent, therefore, is entitled to no costs or disbursements.

II. In any event the respondent is only entitled to ten dollars costs and the disbursements, as of a reference on a motion. Section 3240 of the Code provides costs shall be awarded at the same rates allowed for similar services in an action. An application for a peremptory *mandamus* is a motion (*Code*

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of *Civil Pro.*, *secs.* 767, 768, 2070; *People agt. Supervisors &c.*, 2 *Abb.* [*N. S.*], 78). Section 8251, subdivision 3, paragraph 9, provides, the court may award costs not exceeding ten dollars besides the necessary disbursements for printing, &c. On a special proceeding no costs can be taxed except motion fees and disbursements (*People, &c.*, *agt. Cooper*, 10 *Weekly Dig.*, 77).

III. The court has no authority to order an extra allowance. Provisions awarding extra allowance apply to actions only (*Matter of R. & S. Co.*, *agt. Davis*, 55 *N. Y.*, 145; *sec.* 3253 of the Code).

LAWRENCE, *J.*—This was an application for a peremptory *mandamus* in the first instance. Section 2086 of the Code of Civil Procedure provides that, "where an alternative *mandamus* has been issued, costs may be awarded as in an action, except that upon making a final order the costs are in the discretion of the court. Where a peremptory *mandamus* is granted without a previous alternative *mandamus*, costs not exceeding fifty dollars, and disbursements may be awarded to either party, as upon a motion." It will be observed that this section does not refer to costs in cases in which, as in the case under consideration, the application for the peremptory writ has been denied at chambers. Section 3240 of the Code provides that, "costs in a special proceeding instituted in a court of record, or upon an appeal in a special proceeding taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party in the discretion of the court, at the rates allowed for similar services in an action brought in the same court or an appeal from the same court, and in like manner." It is under this section that the respondent is entitled to costs, if at all. The relator's counsel contends that section 3240 does not aid the respondent, because the costs in *mandamus* proceedings are specially provided for by section 2086, which I have quoted above; but, as that section says nothing about the

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costs to be allowed to the respondent when he prevails on a motion for a peremptory *mandamus*, it would appear to be a forced construction of the language of section 3240 to hold that, as costs have been specially provided for by section 2086, where an alternative writ has been issued, or a peremptory writ has been granted, in the first instance, that the respondent necessarily is to receive nothing where neither writ has been issued, and where an application for a peremptory writ has been denied. On the contrary, I am of the opinion that the respondent is entitled to costs, in the discretion of the court, at the same rates as are allowed for similar services in an action. Now, this application was a motion (*Code, secs. 767, 768; People ex rel. Cagger agt. Supervisors of Schuylers, 2 Abb. [N. S.], 78; Code, sec. 207*). By section 3251 of the Code of Civil Procedure, costs upon a motion, or upon a reference specified in section 3236 of that act, may be awarded at a sum fixed by the court or judge not exceeding ten dollars, besides necessary disbursements for printing and referee's fees. In this case there was a reference to ascertain and report the facts, which is one of the classes of references referred to in section 3236 of the Code and specially provided for by section 1015 of the Code. I am of the opinion, therefore, that the respondent is entitled to ten dollars and the amount paid by him for referee's fees.

N. Y. COMMON PLEAS.

FREDERICK M. PEYSER agt. GEORGE WILCOX.

Principal and agent — Employment of attorney by agent — Right of the principal to proceeds of collection made by attorney.

Where a claim is made by a third party, to money in the hands of an attorney or agent, he is not bound to pay the amount claimed to his principal, unless he is protected against the claim. He must interplead the principal and the claimant, if he can, or he must demand indemnity,

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and deliver the property to the party who indemnifies him ; but if after a notice of a claim by a third party he pays over the money to his client, he becomes liable, if the claimant has a right to the money.
The reasons stated.

General Term, May, 1882.

Before DALY, C. J., VAN BRUNT and BEACH, JJ.

APPEAL from an order of the general term of the marine court, reversing a judgment directed at trial term thereof, by Mr. justice McADAM.

Scudder & Carter and George N. Black, for plaintiff appellant.

H. B. Kinghorn, for defendant respondent.

DALY, C. J. — The judgment of the special term was erroneously reversed.

The instrument given by Le Baron shows that the note was received by him from Anthony for collection, and that all sums collected for principal and interest were to be paid to the plaintiff; and that he was entitled to an assignment from Anthony of any judgment, if one should be obtained. It appeared by the evidence that the explanation of this provision in respect to the assignment, was that the plaintiff did not want to bring a suit upon the notes in his own name, if any suit was to be brought; and that Le Baron told him he would bring the suit in Anthony's name, after which Le Baron signed the instrument, and the note was left with him.

There was nothing in the instrument to show that any amount was to be received by Le Baron for collection. The instrument shows that the note was left with him "for collection by law." Le Baron put it in the hands of the defendant, as attorney, who had a suit brought upon it, in Anthony's name, and recovered judgment, which the defendant collected. He had a lien upon the judgment for his fees, in respect to which there was no dispute, and which were allowed him,

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the judge on the trial, instructing the jury that the plaintiff was entitled to recover, less the fees of the defendant, in accordance with which instruction, they found a verdict only for \$662.49.

After the amount was collected upon the judgment the plaintiff called upon the defendant, who admitted that he had collected the money; and upon the plaintiff asking him for it, the defendant told him to get an order from Le Baron and that his (the defendant's) charges would be \$100, with which charges the plaintiff was satisfied; and the plaintiff left an order with the defendant not to pay the money over to Le Baron. The plaintiff attempted to get an order from Le Baron, but did not succeed, but Le Baron gave notice to the defendant that he claimed to be the owner of the judgment, and made a motion in the court below to compel the defendant to pay the amount collected to him; which motion was opposed by the defendant and by the plaintiff in this action; and in which motion it was decided that upon Anthony's (the plaintiff in the judgment) executing a bond, to be approved by the court, indemnifying the defendant against any damage he might sustain by reason of any claim made for the money and against any judgment the plaintiff in this suit might obtain against him, that he should pay the amount collected to Anthony, which he did.

This being the state of facts, the plaintiff was entitled to recover. The case is not substantially different from *Sims* agt. *Brown* (6 *T. & C. Supr. Ct.*, 5), in which it was held that where a claim is made by a third party to money in the hands of an attorney or agent, he is not bound to pay the amount claimed to his principal, unless he is protected against the claim; that he must interplead the principal and the claimant, if he can, or he must demand indemnity, and deliver the money to the party who indemnifies him; but, if after notice of a claim by a third party, he pays over the money to his client he becomes liable if the claimant has a right to the money, the law being well settled, as was stated by

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SPENCER, J., in *Hearsey agt. Prime* (7 Johns., 181) that an action may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over to him; and in *Hall agt. Marston* (17 Mass., 579) it was said that whenever one man has in his hands the money of another, which he ought to pay over, he is liable to an action of assumpsit although he has never seen or heard of the party who has the right. The money, in this case, by the directions of the marine court, was paid over to Anthony, the plaintiff in the judgment; Anthony giving a bond of indemnity to the defendant for his protection, and upon this bond the defendant must rely, for it clearly appeared by the instrument itself and the evidence on the trial that neither Le Baron nor Anthony, in whose name the judgment was obtained, had any claim to the moneys collected by the judgment upon the note, which, when collected, was to be paid to the plaintiff.

The general term, it would seem, from the opinion delivered, regarded *Hoover agt. Greenbaum* (61 N. Y., 305; and 91 U. S., Otto, 308), as a direct authority for holding that an action cannot be maintained against a sub-agent by the owner of a note left with an agent for collection, who employed the sub-agent by whom the note was collected, and who paid over the amount of the note to his principal after notice of the owner's claim, and a demand by him of the moneys collected. I find nothing in that case, or that can be deduced from it, to warrant such a conclusion. The point determined in the case was whether the owner of a claim which had been collected was answerable for the acts of an agent employed by the collecting agency to whom the owner had transmitted the claim for collection. The attorney employed by the collecting agency, with the knowledge of the debtor's insolvency, obtained a confession of judgment from him, and thereby secured a preference in fraud of the bankrupt act, of which proceeding the owner of the claim knew nothing. The action was by the assignees in bankruptcy to recover from the owners the

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amount collected, upon the ground that the knowledge of the sub-agent of the debtor's condition was their knowledge, and that they are answerable for his acts in obtaining the confession of judgment. It was held that the rule that the knowledge of the agent is the knowledge of the principal was not applicable to such a case; that there was no such relation as principal and agent between the owners and the agent of the collecting agency as could, by construction, charge the owners with the knowledge that the sub-agent had of the insolvent circumstances, or make them responsible for his acts in obtaining a confession of judgment in fraud of the bankrupt act; which is a very different question from the liability of the defendant in this case, to the one for whom, in fact, the note was collected, after notice that the money collected belonged to him, and where, after this notice, it was paid by the defendant to the plaintiff in the judgment, he being indemnified against any loss or injury for so doing.

It further appears, from the opinion delivered, that the general term thought that this action could not be maintained against the defendant, because there was not "any privity of contract between plaintiff and defendant in the transaction," whereas it is the law that if the one who claims money is entitled to it, and the one in whose possession it is has no legal or equitable ground for withholding it from him, there is an implied assumpsit, the law creating the privity and the promise (*Hall agt. Marsh*, 17 *Mass.*, 579).

The judgment of the general term should be reversed, and that of the special term affirmed.

VAN BRUNT and BEACH, JJ., concurred.

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SUPREME COURT.

JOHN ALEXANDER agt. CYNTHIA H. SHILLABER.

Married woman — Complaint — Demurrer — When rule of lex loci contractus applies.

In an action against a married woman to recover for alleged breach of contract by her to sell mining property in the territory of Arizona, a defense set up by her that, according to the laws of Arizona, her interest in the mine was subject to the absolute control of her husband is insufficient in law, it not appearing by the pleadings that defendant is a resident of Arizona, and the contract having been made in the city of New York.

Special Term, December, 1882.

DEMURRER to complaint.

Arthur Thurber, for demurrer.*Cook & Fitzgerald*, opposed.

LARREMORE, J.—The plaintiff in his complaint avers that the defendant was the owner in her own right of an interest in the profits and proceeds of sale of a certain mine known as the "Silver Prince Mine," in Peck Mining District, in the territory of Arizona. That Jessie Benton Fremont was the agent of the defendant to sell such interest. That an agreement was made at the city of New York, February 5, 1880, by said agent with the defendant, for the purchase and sale of one-eighth part of such interest for the sum of \$25,000, upon the payment of which sum the defendant agreed to execute and deliver to the plaintiff a proper deed or transfer of said interest. That the sum above named was paid in pursuance of the agreement, all the conditions of which the plaintiff has fully performed. That the defendant has failed and refused to execute the same, notwithstanding plaintiff's demand. He asks judgment for the amount paid by him with interest and costs of suit.

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The defendant, in answer to this complaint, alleges that prior to the agreement of February 5, 1880, Jessie Benton Fremont held a contract for the purchase of the mine for \$40,000 which the defendant had assumed upon certain conditions, and of which the plaintiff had full knowledge.

For a separate defense the defendant pleads an act of the territory of Arizona, whereby the property of a married woman in said territory, except such as may be acquired by gift, bequest, devise or descent, shall be common property, of which the husband shall have entire management and control, with absolute power of disposition. That at the time of the pretended agency and alleged agreement with the plaintiff the defendant was a married woman; that her interests in the profits and proceeds of sale of the mine was acquired by her after her marriage, and was subject to the absolute control of her husband.

To this separate defense the plaintiff demurs as insufficient in law.

It does not appear by the pleadings that the defendant is a resident of the territory of Arizona. The contract was made at the city of New York, and the rule of *lex loci contractus* must apply (*Barry agt. Equitable Life Ass. Society*, 59 N. Y., 587; *Newton agt. Bronson*, 13 N. Y., 587).

The plaintiff is entitled to judgment upon the demurrer.

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CONTAINING THE WHOLE OF

64 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 27 HUN, AND 88 AND 89 N. Y. REPORTS.

Attention is called to the three additional headings "CODE OF PROCEDURE," "CODE OF CIVIL PROCEDURE" and "CODE OF CRIMINAL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ACTION.

1. An action to establish the priority of a levy under an attachment over an assignment for the benefit of creditors previously executed, and judgments previously confessed on the ground that they are fraudulent as to creditors, and therefore void, cannot be maintained if the property assigned or transferred is of an intangible nature, but can be maintained if the property is of a tangible nature capable of manual delivery. (*Bates et al. agt. Plonsky et al., ante, 232.*)

ADMINISTRATORS.

1. Executors and administrators suing in their representative characters, *unnecessarily* in cases where the cause of action (if any) accrues to them in their individual right, and failing to recover, are personally liable to the defendant for costs. (*Feig et al. agt. Wray, ante, 391.*)
2. Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action rests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form in his rep-

resentative capacity, unnecessarily, if he fails to obtain judgment. (*Id.*)

3. In such case the defendant may enter judgment against the plaintiff for costs without an order of the court permitting him to do so. (*Id.*)
4. The next of kin of a deceased intestate must institute proceedings within the time in which actions of a similar character are required to be commenced, to compel the administrator to account and to distribute the estate. (*Matter of Van Epps, ante, 464.*)
5. One Van Epps died intestate in 1858, and in that year H. Van Epps was appointed administrator. In 1882, A. Van Epps, one of the next of kin applied by petition to the surrogate, to compel the administrator to account and for his share of the estate:
Held, that lapse of time barred the application. (*Id.*)

AFFIDAVIT.

1. An affidavit on which an order for service of a summons by publication is asked, which is entirely on information and belief as to the non-residence of the defend-

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ant, without stating the ground of deponent's information, is insufficient. (*Lyon agt. Baxter, ante, 426.*)

AGREEMENT.

See INSURANCE, LIFE.

The People agt. Globe Mutual Life Insurance Company, ante, 240.

AGREEMENT OF SEPARATION.

1. Where a case is submitted on the pleadings, everything stated in the complaint or set up in the answer to it, may be taken as facts agreed upon between the parties. (*Allen agt. Affleck, ante, 380.*)
2. An agreement of separation between husband and wife is of no effect, unless the parties are separated when the agreement is entered into, or they separate afterwards in pursuance of the agreement. (*Id.*)
3. An agreement between husband and wife and a trustee selected by them, providing for a separation of the husband and wife during life is valid both at law and in equity, and a provision awarding the custody of the children, either to the husband or wife is not necessarily void. (*Id.*)
4. The question how far these agreements are valid discussed. (*Id.*)
5. Although an agreement be void, yet if a party has derived a benefit from it by a part performance, he must pay for what he has received, and the stipulated amount which the trustee was to receive and the husband was to pay may be taken as the measure of damages. (*Id.*)
6. If a provision as to the custody of children be voidable, the husband may test the question by

habeas corpus or by demanding the custody of the children upon that ground, and then refusing to pay for further maintenance. (*Id.*)

AMENDMENT.

1. A plaintiff, by noticing for trial an issue of law raised by the service of a demurrer to the complaint, does not waive his right to serve an amended complaint within the time allowed by law. (*Clifton agt. Brown, 27 Hun, 231.*)
2. Plaintiff's complaint alleged in substance that in November, 1873, F., their intestate, was appointed "record clerk of the board of police justices of the city of New York," and performed the duties of that office up to July 5, 1874, when he received notice of removal. Plaintiff sought to recover the salary after May 1, 1874. On the trial plaintiff offered in evidence monthly pay-rolls, each entitled "Pay-roll of record clerk of the city of New York." Plaintiff was named therein as "record clerk of the city." The defense was that said office, which was created by the act of 1867 (*sec. 2, chap. 961, Laws of 1867*), was abolished by the act of 1873 (*sec. 5, chap. 538, Laws of 1873*), and so that the appointment of F. was illegal. Plaintiff's counsel asked to have the complaint amended by this court, so as to designate F. as "record clerk of the court of special sessions:"
Held, that if the provisions of the Code of Civil Procedure (*sec. 723*), in reference to amendments, applies to this court, it should not be exercised save where no substantial right of the adverse party would be affected; that the case having been tried upon a different issue, the defendant succeeding upon grounds which rendered evidence on its part unnecessary, when if an amendment had then been made, a different case might have been presented, the amend-

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ment could not be allowed here. (*Fitch agt. Mayor, &c.*, 98 N. Y., 500.)

3. The provision of the Code of Civil Procedure in regard to amendments (*sec.* 728) does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants. (*N. Y. S. M. M. P. Assn. agt. R. A. Works*, 89 N. Y., 22.)

4. It seems, that upon motion made to vacate a judgment because of informality of the proof of service of the summons, the informality may be cured by amendment. (*Maples agt. Mackey*, 89 N. Y., 140.)

ANSWER

1. By obtaining an extension of time in which to answer, the defendant extends the time of the plaintiff to serve an amended complaint. (*Albert Palmer Company agt. Shaw, ante*, 80.)
2. Where a paper served as an answer is clearly an answer and demurrer, the defendant may be compelled to elect whether he will abide by his answer or demurrer. (*Bernard agt. Morrison, ante*, 108.)

APPEAL

1. Where, in a proceeding under the assignment act to compel the attendance of one of the assignors before a referee for examination respecting a trade-mark, as a witness, on the application of creditors, two appeals are taken by the assignor, namely, one from an order denying a motion to set aside the original order directing such examination, and the other from an order denying a motion for a stay of proceedings and leave to apply to another judge for such stay, the papers on the two ap-

peals are bound up and served together:

Held, the papers on appeal are obnoxious to the objection of respondent's motion that they be separated. The papers submitted on each order should be separated. (*In re the Assignment of Sweeney et al., ante*, 831.)

2. Where, in such case, an opinion was filed by the court below, giving reasons for the decision of the motion, the opinion should be inserted as a part of the papers set up for review to the general term. (*Id.*)
3. Where papers are inserted which were never used nor submitted at special term, a motion to suppress them will be granted by the judge who heard the motion on settlement. Adjournments indorsed on the papers used by the court below must appear before the appellate court, where they are claimed to be essential. (*Id.*)
4. Where the notice of appeal from a decision of the surrogate's court to the general term of the supreme court, describing the decree appealed from by its date and title, is perfected, the supreme court acquires jurisdiction of the entire decree, and may reverse the same for errors not mentioned in the petition of appeal (*See 3 R. S. [6th ed.], 896, secs. 28, 29, 30; Code of Civil Procedure, secs. 2574, 2575, 2584, 2586, 2587, 2589*). (*Waterman agt. Ball, ante*, 368.)
5. Defendant served in time regularly a notice of appeal from a justice's judgment, to the county court, and in the notice of appeal inserted the words, viz.: "Said appellant hereby demands a new trial in the appellate court." Thereupon the plaintiff, upon an affidavit and notice of motion, asked the county court to dismiss the appeal. The notice of motion points out no irregularity or grounds for dismissing the appeal

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to the county court. But the affidavit used upon the motion referred to the pleadings in the justice's court, and added that the plaintiff was informed by counsel, and verily believe that a new trial of such action could not be claimed or had in the county court, and that said appeal is unauthorized by law and cannot be sustained. On motion of plaintiff the appeal was dismissed, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of the motion. On appeal from such order:

Held, first, that the order made by the county court, dismissing the defendant's appeal to that court, is appealable.

Second. No sufficient reason was presented to the county court for dismissing the appeal, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of motion.

Third. The appeal to the county court was regular, and the appellant was entitled to have either a new trial in that court, or a hearing and consideration by the county court of the questions of law presented by the appeal.

Fourth. The defendant had, by his answer, denied all the allegations of the complaint, and that formed an issue upon which he was entitled to have his appeal determined without an amendment, even if the second branch of his answer was defective. This would be so whether there was a new trial in the county court or simply a hearing of the appeal upon the questions of law. (*Matteson* agt. *Hull*, *ante*, 515.)

See COSTS.

Murtha agt. *Curley et al.*, *ante*, 222.

See STAY OF PROCEEDINGS.

The People ex rel. Sherwin agt. *Meud*, *ante*, 252.

See BENEFIT SOCIETIES.

Buchman agt. *New Yorker Dutcher Arbiter Bund*, *ante*, 442.

6. The plaintiffs appealed from a judgment in favor of the defendant, entered upon the verdict of a jury. A motion made by the plaintiffs upon the judge's minutes for a new trial had been denied prior to the service of such notice of appeal. After the time to appeal from the order denying this motion had expired the plaintiffs applied for and procured leave to amend the notice of appeal from the judgment, by inserting therein a statement that they also appealed from the said order;

Held, that the court had no power to allow the amendment. (*Piper* agt. *Van Buren*, 27 *Hun*, 384.)

7. In the notice of appeal from the order denying their motion the appellants inserted their names instead of the names of the original plaintiffs. Upon a motion to dismiss the appeal on this ground:

Held, that it would seem that, under sections 1295, 1296 and 1300 of the Code of Civil Procedure, the appeal might be properly so taken. (*McLachlin* agt. *Brett*, 87 *Hun*, 18.)

8. That, if this were not so, the court had power and it was its duty, under sections 723 and 724 of the Code of Civil Procedure, to amend the title by changing it to the original title of the action. (*Id.*)

9. Where, after the expiration of the time specified in the published notice for the presentation of claims to a receiver of an insolvent life insurance company, certain policyholders, whose claims had been presented and allowed, died:

Held, that the supreme court had power to direct a revaluation of such policies, and the exercise of this power was within its discretion; and that, therefore, an order denying an application for such a revaluation on the ground solely of lack of power was error. (*In re Atl'y-Gen. agt. Conf'l L. Ins. Co.*, 88 *N. Y.*, 77.)

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10. In an action brought under the Revised Statutes (2 R. S., 463, *secs.* 36, 37), against a railroad corporation by a judgment creditor to sequester its assets, &c., a receiver was appointed, who, upon motion of stockholders holding a minority of the stock, without notice to the others, was ordered to sell the property and franchises of the company. Thereafter a motion was made by stockholders holding a majority of the stock on notice to the receiver and those stockholders who made the former application, for an order vacating the order of sale; this motion was denied. On appeal to the general term the order denying the motion was affirmed, but a stay of proceedings under the order of sale was granted until the further order of the court, without prejudice to a new application, to vacate said order of sale. On appeal from so much of the general term order as granted the stay, and stated that the affirmance was without prejudice:
- Held*, that the portion of the order appealed from was within the discretion of the court below, and was not reviewable here; that as it appeared that the appellants were a minority of the stockholders, and that the stock was absolutely worthless as such, and it did not appear that any creditors asked for the sale, also it appearing that efforts were being made by the majority to utilize the road, there were facts sufficient before the court, upon which it could exercise its jurisdiction. (*Syr. Sgs. Bank* agt. *Syr. C. & N. Y. R. R. Co.*, 88 N. Y., 110.)
11. Where a complaint sets forth two distinct and separate causes of action, and a recovery is had upon both, the general term has power upon appeal, with plaintiffs' assent, to reverse the judgment as to one, and affirm it as to the other. (*Crim* agt. *Starkweather*, 88 N. Y., 339.)
12. When there is evidence sufficient to authorize the decision of a surrogate in proceedings for the probate of a will, and it is affirmed by the supreme court, this court has no power to review the questions of fact. (*Marz* agt. *McGlynn*, 88 N. Y., 357.)
13. This action was to recover for services alleged to have been rendered by plaintiff's intestate as attorney and counsel. The witness S. testified to conversations and transactions between the deceased and defendant O., in reference to a certain suit. It was claimed by plaintiff's counsel that if the referee erred in excluding the testimony of O., it was immaterial, because the referee disallowed the claim for services in that suit:
- Held*, that as S. also testified as to other claims which were allowed, and the allowance depended largely upon the credit to be given to his testimony, defendants were entitled to the benefit of any contradiction in respect to said suit, which would have tended to impeach his credit or accuracy. (*Pinney* agt. *Orth*, 88 N. Y., 447.)
14. Certain questions were asked O., in regard to the services of the deceased in another suit as to which S. testified; the exclusion of these questions was held error by the general term, but it affirmed the judgment on condition that plaintiff should deduct from the recovery the amount allowed for services in that suit:
- Held*, error; as it deprived defendants of any advantage from a material contradiction of plaintiff's witness. (*Id.*)
15. *It seems* that such a course would be proper only in case the evidence of the witness so sought to be contradicted related solely to the item rejected, and his whole testimony could be stricken out without affecting the residue of the recovery. (*Id.*)

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16. To cure an error in the rejection of evidence, it must appear as matter of law that the result could not have been materially affected thereby. (*Id.*)
17. The complaint in an action against an attorney for negligence in loaning the moneys of his principal on worthless bonds and mortgages, contained an offer to assign to him the bonds and mortgages; the point that no tender had been made did not appear to have been raised upon the trial. No provision was made in the judgment for a transfer:
Held, that the objection was not tenable here. (*Whitney agt. Martine*, 88 N. Y., 535.)
18. An order of the general term of the supreme court reversing an order of special term adjudging a party guilty of criminal contempt of court and punishing him therefor is not reviewable here; it is not for this court to vindicate the authority of the supreme court against an alleged contempt which the general term ignores or does not find. (*People ex rel. agt. Gilmore*, 88 N. Y., 626.)
19. A proceeding, however, to punish for such a contempt is a criminal proceeding, and the general term, on reversal of the order of special term, has no authority to impose costs upon the relator. (*Id.*)
20. Under the provisions of the Code of Civil Procedure (*sec. 2545*), declaring that the decree of a surrogate "shall not be reversed for an error in admitting or rejecting evidence unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," to justify a reversal it must appear that had competent evidence, which was rejected, been received, the appellant's case would not have failed, or without improper evidence which was received, the respondent's case was deficient. (*Snyder agt. Sherman*, 88 N. Y., 656.)
21. The general term of the supreme court, on affirmance of an order overruling a demurrer to the complaint in an action, has the same power before possessed by the special term (*Code of Civil Pro.*, *sec. 1021*), to designate what kind of an interlocutory judgment and final judgment shall be entered. (*Smith agt. Rathbun*, 88 N. Y., 660.)
22. If either party is dissatisfied with its order in this respect, his remedy is not by appeal therefrom, but by appeal from the final judgment when rendered. (*Id.*)
23. The form in which the court below shall express its opinion is a matter to be settled by it, and is not reviewable here. (*Id.*)
24. A writ of prohibition is not demandable as matter of right, but of sound judicial discretion (*People ex rel. Adams agt. Westbrook*, 89 N. Y., 152.)
25. An order of the General Term of the Supreme Court, therefore, denying the writ is not reviewable here. (*Id.*)
26. Plaintiff's claims herein amounted to \$406. Defendant set up a counter-claim of \$300, to which plaintiff interposed a reply. On the trial, which was before a referee, but little evidence was given in support of the counter-claim, and no request was made for a finding in its support. The report and the judgment were for just the amount of plaintiff's claims:
Held, that this was the matter in controversy, and as the amount was less than \$500, an appeal to this court could not be taken. (*St. Clair agt. Day*, 89 N. Y., 357.)
27. An order vacating an attachment issued before judgment is not re-

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viewable here. (*Nat. S. and L. Bk. agt. Mech. Nat. Bk.*, 89 N. Y., 440.)

abandoned. (*Tunstall agt. Winton*, 27 Hun, 264.)

28. On appeal to this court brought to review the decision of commissioners appointed to change the proposed route of a railroad, only questions of law can be considered and determined, and all that can be done by the General Term of the Supreme Court, or by this court, is to send the report back where errors of law have been committed. (*In re L. S. and M. S. R. R. Co.*, 89 N. Y., 442.)

3. Under the provisions of the Code of Procedure in reference to the discharge of a defendant, who has been taken into custody under an order of arrest, upon giving bail (*sec. 186, et seq.*) where a defendant has once given bail, which the sheriff has accepted, he has the absolute right to be at large until a failure of bail to justify as prescribed in said provisions. (*Artega agt. Conner*, 88 N. Y., 408.)

ARREST.

1. The complaint alleged, in an action for conversion, that "plaintiff deposited for safe keeping with the said defendant, as plaintiff's broker, certificates for 1,000 shares" of mining stock, "and the said defendant thereupon accepted the custody of said stock certificates, and promised and agreed to and with the plaintiff to keep the said stock for the plaintiff, and to hold the same for the plaintiff subject, to the plaintiff's orders and instructions:"

Held, that an order of arrest granted in the case must be vacated, because the complaint fails to state a cause of action, in that there is no allegation of ownership by the plaintiff of the certificates of the stock. (*Wright agt. Field*, *ante*, 117.)

2. Where a husband has without cause or provocation abandoned his wife and fraudulently disposed of his property in such a manner as that it cannot be appropriated to her support or to the payment of the debts she might contract on his credit for that purpose, he may be arrested under subdivision 2 of section 550 of the Code of Civil Procedure, in an action brought against him by one who has expended moneys in supporting and maintaining the wife while so

4. After the discharge of A. on giving bail, plaintiff's attorneys served upon the sheriff notice of non-acceptance of the bail. Thereafter A.'s attorneys moved to vacate the order of arrest, and plaintiff's attorneys stipulated that A. should have five days after the decision of said motion in which to serve notice of justification of bail. Before the decision of the motion, the sheriff made an indorsement upon the original undertaking of bail, to the effect that A. was thereby remanded to jail for non-justification of bail, and deputing E. to execute the remand. E. thereupon arrested A., took him to the county jail and delivered him to the custody of W., the jailer, who detained him until he was discharged on *habeas corpus*. Before A. was taken to jail, the sheriff was fully advised of the stipulation and the claim of A. that he was not liable to be rearrested. In an action for false imprisonment:

Held, that the sheriff, and also E. and W., were liable; that the papers delivered to W., constituted no process regular upon its face and so did not protect him, but were merely an authority given by the sheriff for his private purpose and benefit; and that W., therefore, acted simply as his agent, and must stand or fall upon the same defenses as his principal. (*Id.*)

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ASSIGNMENT ACT.

*See PRACTICE.**Matter of Sweeney, ante, 353.*

ATTACHMENT.

1. Where it is contended that, at the time of the issuing and levy of an attachment against a National bank without the state, such bank was insolvent, the burden of showing that it was insolvent at that time is upon the defendant; and that fact should be made clearly to appear or else the attachment should be maintained. (*Market National Bank of New York* agt. *Pacific National Bank of Boston*, ante, 1.)
2. Where a warrant of attachment is granted in an action against two joint defendants, a service of the summons upon one of the defendants within thirty days is sufficient compliance with the provision of the Code in that regard. (*Orvis* agt. *Goldsmith et al.*, ante, 71.)
3. An action to establish the priority of a levy under an attachment over an assignment for the benefit of creditors previously executed, and judgments previously confessed on the ground that they are fraudulent as to creditors, and therefore void, cannot be maintained if the property assigned or transferred is of an intangible nature, but can be maintained if the property is of a tangible nature capable of manual delivery. (*Bates et al.* agt. *Plonaky et al.*, ante, 282.)
4. An attachment is justified in favor of a creditor on a joint demand for goods sold and delivered when one of two copartners, who are jointly and individually insolvent, makes a fraudulent transfer of his interests in the firm to his copartner. (*Hirsch* agt. *Hutchison*, ante, 366.)
5. It is not necessary that an affidavit upon which an attachment is applied for should contain the precise words used in the Code of Civil Procedure (sec. 636), if equivalent words be used. It is sufficient if the affidavit furnishes evidence from which the judge may be lawfully satisfied of the truth of the matters required to be shown. (*Larkin* agt. *Douglass*, 27 Hun, 517.)
6. An affidavit was made by the plaintiffs' agent, in which he stated that a cause of action existed in favor of the plaintiffs and against the defendant; and that the amount of the claim in the said action was \$1,216.42, "over and above all discounts and set-offs." The affidavit then stated in detail facts showing the amount of the defendant's indebtedness to the plaintiffs, and the manner in which it arose, and the other facts required to authorize the judge to grant the attachment:
Held, that the affidavit was sufficient; that it was not necessary under all circumstances that it should be made by the plaintiff himself, and that the omission of the words "known to him" after the words discounts and set-offs did not affect the sufficiency of it. (*Id.*)
7. Where, within thirty days from the time of the issuing of an attachment, the defendant appears by an attorney, who serves a formal notice of appearance in his behalf, it is not necessary to serve the summons upon the defendant either personally or by publication, in the manner required by section 638 of the Code of Civil Procedure. (*Pomeroy* agt. *Ricketts*, 27 Hun, 242.)
8. In an affidavit, upon which an application for an attachment was based, the cause of action was stated as follows: "The defendants owe my firm one thousand eight hundred and eight dollars

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and seventeen cents over and above all counter-claims known to plaintiff and to me, for goods, wares and merchandise sold and delivered by my firm to the defendants, who are copartners and were such during all the times herein mentioned, between January 8, 1880, and June 30, 1880. No part has been paid:”

Held, that a cause of action was not stated with sufficient clearness to authorize the issue of an attachment. (*Id.*)

9. The affidavit upon which an attachment is applied for should be explicit and state in clear and concise terms a cause of action, and such facts as will satisfy the court or officer to which or to whom the application is made of the intent and attempt of the defendant to cheat and defraud his creditors. In general these facts should be stated upon positive knowledge, but when, from the circumstances of the case they cannot be so stated, they may be stated upon information and belief, giving the names of the persons and the sources from which the information is derived and the reasons why the affidavits of those having positive knowledge cannot be procured. (*Bennett* agt. *Edwards*, 27 Hun, 352.)
10. Where the party having positive knowledge of the facts refuses to make an affidavit the applicant is not obliged to procure an order, under section 885 of the Code of Civil Procedure, requiring him to appear before a referee and submit to an examination. (*Id.*)
11. It need not appear from the affidavits used upon an application for an attachment, that the action has been commenced, or that a summons has been then issued. (*Pickhardt* agt. *Antony*, 27 Hun, 269.)
12. Under the provisions of the Code of Civil Procedure, an attachment

cannot be issued against the property of a defendant, in an action brought simply to recover damages for obtaining goods by false and fraudulent representations. (*Wittner* agt. *Von Minden*, 27 Hun, 284.)

13. Under the Code of Procedure a money judgment against a non-resident upon whom there was no personal service of summons, but service was made by publication, and who did not appear in the action, cannot affect any property of the defendant except such as has been taken by virtue of an attachment regularly issued in the action. (*McKinney* agt. *Collins*, 88 N. Y., 216.)

14. Defendant, the N. O., St. L. & C. R. Co., deposited in the hands of defendants K. & A., brokers in New York city, \$25,000 to meet interest coupons falling due on certain bonds, the payment of which it had assumed, receiving a receipt therefor which stated that the money was received “in trust to apply the same to an equal amount of the coupons * * * in the order in which said coupons shall be presented to us for payment after having been duly identified; * * * the said money not to be subject to the control of said company otherwise than for the payment of said coupons.” This money was placed by K. & A. to the credit of “coupon trust account” on their books. After a portion of this fund had been paid out, C., as sheriff, levied an attachment, issued in an action against said corporation, upon the balance. In an action to determine the effect of the levy under the attachment:

Held, that the transaction between the corporation and said broker was an absolute and irrevocable appropriation of the fund for the purpose specified; that the corporation parted with all control inconsistent with the trust declared in the receipt, and had no

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- remaining interest subject to attachment, save it might be to any unexpended balance remaining after payment of the coupons; and this, although the coupons had not been presented when the attachment was levied, and the existence of the trust was not known to the holders; that notice to or assent of the creditors to be benefited was not essential to the completeness of such trust. (*R. L. & M. Works* agt. *Kelley*, 88 N. Y., 284.)
15. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. (*Hall* agt. *Brooks*, 89 N. Y., 383.)
16. An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor (*Code*, sec. 655). (*Id.*)
17. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein:
Held, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. (*Id.*)
18. After the commencement of an action by the United States, in the United States circuit court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to foreclose the mortgage. Upon application of the owners of the equity of redemption the United States circuit court directed the levy to be discharged unless the United States consented to appear and submit to the jurisdiction of the state court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability and directing plaintiff to satisfy the mortgage upon payment into court of the amount due, with costs, with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action, on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff:
Held, that the order was proper. (*Johnston* agt. *Stimmel*, 89 N. Y., 117.)
19. Under the Code of Procedure (secs. 232-6), a debt evidenced by a negotiable security, owned by and in the hands of an attachment debtor, could be attached by serving the attachment upon the maker of the security. (*Bills* agt. *Nat. Park B'k.*, 89 N. Y., 343.)
20. While the attachment might be defeated by a subsequent transfer of the security to a *bona fide* holder for value, payment thereof by the maker to one who, to his knowledge, did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, was no defense to an action to enforce the lien of the attachment. (*Id.*)
21. Prior and up to April 27, 1875, the N. O., St. L. and C. R. R. Co., had a deposit account with defendant; the deposits being made by R., its assistant treasurer, and its principal officer in New York, of whose official position defendant was fully informed; on that day said company having a balance to its credit drew its check for the amount, which was certified by defendant, charged to the com-

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pany and delivered to R. On April 30, 1875, an attachment against said company was served upon defendant by delivery of a copy with proper notice. The check at that time was still in the possession of R., and was owned by the company. On the same day, shortly after the service of the attachment and after R. had been informed thereof, he opened an account in his individual name, depositing to the credit thereof the said check and other negotiable securities drawn to his order as assistant treasurer, and belonging to said company. R. had no individual account prior to that date, and defendant had reason to and did believe that the securities were the property of the company, and that the deposit was intended to pay its debts; to which purpose it was afterward applied, being drawn out on the individual checks of R. In an action brought after the going into effect of, and pursuant to the provisions of the Code of Civil Procedure (*secs. 677, 678*), to recover the attached debt:

Held, that the plaintiffs were entitled to recover; that the certification of the check did not absolutely pay and discharge the deposit account, but the debt evidenced by it was liable to attachment; that the deposit of it by R. in his own name did not vest title in him, and as the debt remained the property of the company it was properly attached, and the checks having subsequently come to the hands of defendant, it was liable. (*Id.*)

22. As to whether the law in reference to attaching debts evidenced by negotiable securities has been changed by the Code of Civil Procedure (*secs. 648, 649*), *quære*. (*Id.*)

23. A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may under the Code of Civil Procedure (*sec. 683*), move to vacate the attachment without being made a party to the action. (*Nat.*

Shoe and L. Bk. agt. Mech. Nat. Bk., 89 N. Y., 440.)

24. Under the National Banking Act (*U. S. R. S., sec. 5798*), an attachment is prohibited and may not issue out of a state court against a National bank which is or is about to become insolvent. (*Nat. S. and L. Bk. agt. Mech. Nat. Bk.*, 89 N. Y., 467.)

25. The plaintiffs, who were attorneys and counselors, were employed in one or the other capacity by defendant H. in various suits and legal proceedings between him and defendants L. & J. H. Ingersoll; one was an action for malicious prosecution brought by him during the progress of the litigations. H. made an oral agreement with plaintiffs that they should be paid for their services out of any moneys he should obtain or become entitled to from any of the suits or proceedings, and "should have a lien for all sums that might be owing or due them for their said services and for the services of each of them," which lien should be superior to any right he might have. All of these actions and proceedings were finally, by agreement of the parties, submitted to an arbitrator, who among other things awarded to H. \$10,000 as damages for the malicious prosecution. Before said award was made defendant B. recovered a judgment in this State against H., which was assigned to defendant Ivins. Two days before the time fixed by the award for the payment of the \$10,000, Ivins brought an action in Connecticut against H., upon the judgment, an attachment was issued therein which was served in that State on L. Ingersoll who then resided therein, and the sheriff returned the writ with his indorsement that L. Ingersoll disclosed an indebtedness on the part of the garnishees to H. of \$10,000. The Ingersolls had no notice of the lien of plaintiffs upon the award, until after service of

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the attachment. Ivins, after the commencement of this action, recovered judgment in the Connecticut action, and after return of execution unsatisfied, a *scire facias* was issued according to the law and practice of that State against the Ingersolls, to compel payment by them of the amount of the judgment; they appeared in answer thereto and informed the court of plaintiffs' claim; it ordered notice to be given to plaintiffs of the attachment proceedings. Plaintiffs did not appear, and the *scire facias* is still pending. Prior to the commencement of this action, brought to enforce plaintiffs' alleged claim and lien upon the award, L. Ingersoll had removed to this state, and all the other parties were then, and at the time the attachment was served, residents therein:

Held, that the debt created by the award had its *situs* in this state and so was not affected by the attachment; also that, as at the time of the service thereof the debt did not belong to H., nothing was attached, and as to plaintiffs the attachment was a nullity. (*Williams* agt. *Ingersoll*, 89 N. Y., 508.)

26. *It seems*, that the judgment herein may be used to defeat the Connecticut attachment. (*Id.*)

27. But *held*, that the Ingersolls, if they desire, might have, as part of the judgment herein, an injunction restraining Ivins from proceeding further in the foreign jurisdiction. (*Id.*)

28. No greater force of efficacy will be given to a foreign than to a domestic attachment. (*Id.*)

ATTORNEY AND CLIENT.

1. A client is responsible for stenographer's fees in proceedings in a case where such stenographer is employed by attorneys to take the

minutes. (*Harry* agt. *Hilton*, ante, 199.)

See PRINCIPAL AND AGENT.

Pryor agt. *Wilcox*, ante, 525

2. The lien for costs which an attorney has upon his client's (the plaintiff's) cause of action does not make him interested in the result, within the meaning of section 829 of the Code of Civil Procedure, so as to prevent him from testifying as to personal transactions had with a deceased person, through whom the defendants claim.

Seem, that it would be otherwise if the attorney were to have a certain share of the recovery or to receive nothing unless his clients succeeded. (*Sherman* agt. *Scott*, 27 Hun, 531.)

3. When an attorney is acting for two clients his communications with them are not privileged in a subsequent litigation arising between the representatives of the said clients. (*Id.*)

4. Where, upon the sale of a stock of goods under an execution issued upon a judgment recovered against the owner, the attorney for the judgment creditor purchases the goods and thereafter sells them at an advance, his client is entitled to claim and receive the profits so realized. (*Matter of Friedman*, 27 Hun, 301.)

5. The court may in such a case, upon an application made by the client, even before the execution has been actually returned, ascertain in a summary manner the amount due, and require the attorney to pay it over to him, or in default thereof direct that he be committed to close custody in prison. (*Id.*)

6. An action is not maintainable against the receiver of an insolvent life insurance company, to recover for services rendered by an attor-

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ney to the corporation after the appointment of the receiver; the company or its officers cannot, after such an appointment, subject the funds in the receiver's hands to any legal liability. (*Barnes* agt. *Newcomb*, 89 N. Y., 108.)

- 7 The A. M. Life Insurance Co., having been served with an order to show cause why a receiver should not be appointed, retained plaintiff to oppose, which he did. The application was granted. Plaintiff advised, and at the request of the officers took an appeal to the General Term and to the Court of Appeals; the order was affirmed. Afterward, without any specific instructions, but with the knowledge and assent of the officers, plaintiff opposed the confirmation of the report of the actuary. In an action to recover for his services plaintiff testified that he rendered such services under the original general retainer.

Held, that there was no entire contract, at the time of the original retainer, established, binding the company and its assets for its performance, so as to create a liability on the part of the receiver, payable out of the funds, for services rendered after his appointment; and that plaintiff was only entitled to recover for services rendered before such appointment. (*Id.*)

- 8 The plaintiffs, who were attorneys and counselors, were employed in one or the other capacity by defendant H. in various suits and legal proceedings between him and defendants L. & J. H. Ingersoll; one was an action for malicious prosecution brought by him during the progress of the litigations. H. made an oral agreement with plaintiffs that they should be paid for their services out of any moneys he should obtain or become entitled to from any of the suits or proceedings, and "should have a lien for all sums that might be owing or due them for their said

services and for the services of each of them," which lien should be superior to any right he might have. All of these actions and proceedings were finally, by agreement of the parties, submitted to an arbitrator, who among other things awarded to H. \$10,000 as damages for the malicious prosecution. In an action to enforce their alleged claim and lien upon the award, wherein the value of plaintiffs' services was found to be more than the amount thereof:

Held, that the agreement operated as an equitable assignment, which attached to the award as soon as it was made, and was good against H. or any attaching creditor, and this, although it was for damages on account of a personal tort; that it was not needful in order to make such assignment or lien valid and effectual that notice thereof should have been given to the debtors. (*Williams* agt. *Ingersoll*, 89 N. Y., 508.)

9. *It seems*, that such notice would have been necessary only to defeat a subsequent *bona fide* payment by the debtors. (*Id.*)

10. By the award H. was found indebted to various parties connected with the litigation in specified sums, and among them to J. H. Ingersoll. It was claimed, on behalf of the Ingersolls, that these items should be allowed as offsets:

Held, untenable, as the items were not payable to the two Ingersolls, who owe the amount of the award claimed, and as provision was made for their payment by deduction from another sum due H., to be ascertained as prescribed by the award. (*Id.*)

11. *It seems*, that plaintiffs could claim no general lien, as attorneys, upon the award. (*Id.*)

12. *It seems*, also, that plaintiffs could not base their claim to an equitable lien upon the mere promise of H. that they should be paid out of any moneys received. (*Id.*)

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ATTORNEY-GENERAL.

1. Under the act of 1848, the attorney-general has no right to appear by special or local counsel on the trial of a case at the circuit court. (*The People agt. Metropolitan Telephone and Telegraph Co., ante, 66.*)

ATTORNEY'S LIEN.

1. An attorney's lien under section 66 of the Code extends to both costs and services, and cannot be affected by any settlement between the parties. (*Albert Palmer Company agt. Van Orden, ante, 79.*)
2. The proper practice is for the attorney to proceed to collection of the judgment, to the extent of his lien, in the name of the client. (*Id.*)
3. It is not necessary to serve a notice of lien. (*Id.*)

BAIL.

1. Under the provisions of the Code of Procedure in reference to the discharge of a defendant, who has been taken into custody under an order of arrest, upon giving bail (*sec. 186, et seq.*), where a defendant has once given bail, which the sheriff has accepted, he has the absolute right to be at large until a failure of bail to justify as prescribed in said provisions. (*Artega agt. Conner, 88 N. Y., 403.*)

BANKRUPTCY.

1. Judgment was recovered against the defendant on March 16, 1876, on a debt contracted prior to February 26, 1876, upon which date defendant was adjudicated a bankrupt. On July 31, 1876, defendant obtained his discharge in bankruptcy:

Held, first. That the judgment was not such a merger of the in-

debtedness as to create a new debt, and that the debt as well as the judgment were necessarily discharged by the bankruptcy proceedings.

Second. That section 1268 of the Code of Civil Procedure is imperative and absolutely entitles defendant to an order canceling the judgment from the docket.

Third. That a rehearing of a motion may be had before a court held by the judge who heard the original motion, either upon the original papers or upon new papers. (*Arnold agt. Oliver, ante, 452.*)

BENEFIT SOCIETIES.

1. When a party, formerly a member of a benefit society, sleeps upon his alleged rights to restoration as a member for an unusual length of time, such seeming acquiescence in his expulsion is of itself unfavorable to his application for restoration. (*Bachman agt. New Yorker Deutscher Arbeiter Bund, ante, 442.*)

2. The plaintiff brought an action in a district court in this city for the recovery of weekly allowances or benefit money for a period before his expulsion, and beyond it, and the defendant set up, among other defenses to his right to recover, that the plaintiff had been expelled:

Held, that by including in his claim for weekly allowances a period beyond his expulsion, and by submitting the question of its regularity to the decision of the justice, the plaintiff's only remaining remedy was by an appeal. (*Id.*)

3. Where, in such a case, a party submits the question of his expulsion to the justice, even though the justice has no inherent equity jurisdiction, he is concluded by his determination. (*Id.*)
4. When a matter is regularly determined, in whatever form, by a

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competent tribunal, the same is not open to inquiry in any other proceeding between the same parties. A judgment at law is conclusive in equity upon the same subject between the same parties. (*Id.*)

5. Courts of equity have no revisory powers over benefit societies who are regulated by their own laws and rules, which are conclusive upon their members, provided they are conducted fairly according to their rules; and when the latter fact is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject should be closed. (*Id.*)

6. Every presumption is in favor of the fairness of the expulsion of a member from such a society, because the interests of the fellow-members are naturally that the rights of each individual member should be sedulously guarded, as the same measure they apply to others may in the end be administered to themselves. (*Id.*)

BENCH WARRANT.

1. The court of oyer and terminer has jurisdiction to try an indictment found in the court of sessions of the county without any order of the sessions sending the indictment to the oyer for trial. (*The People ex rel. Sherwin agt. Mead, ante, 41.*)
2. On an indictment found before the Code of Criminal Procedure took effect, a justice of the supreme court has no power to let one arrested on a bench warrant to bail while a court is in session having jurisdiction to try the indictment. (*Id.*)
3. The statute, prior to such Code, authorizing a district-attorney to
- issue a bench warrant for the arrest of one indicted, makes no requirements as to the form of the warrant or the matters which shall be stated therein. (*Id.*)
4. The sufficiency thereof must be determined by the common-law rule on the subject. (*Id.*)
5. It is sufficient if the bench warrant clearly indicate the nature of the offense for which the accused stands indicted, and the place and the court in which the indictment is pending. (*Id.*)
6. Sections 801 and 802 of the Code of Criminal Procedure do not, by section 962, apply to indictments found before such Code took effect. (*Id.*)
7. Sections 801 and 802 only apply to the form of a bench warrant to be issued by the clerk, on the application of the district-attorney, in cases where the prisoner has been let to bail, or has deposited money instead thereof, and has failed to appear in pursuance of his recognizance. (*Id.*)
8. When the district-attorney himself issues the bench warrant, he is not required to follow the form provided in section 801. (*Id.*)
9. Where one is served in the city of New York with a subpoena issued by a court in Albany county, and fails to obey it, he is guilty of a criminal contempt, for which he may be indicted in Albany county. (*Id.*)
10. Personal presence at the place where the crime is perpetrated is not indispensable to constitute an offense. (*Id.*)
11. Failure to attend the court in Albany county impeded and delayed the administration of justice at that place, and the law presumes the accused intended that

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his behavior should have that effect. (*Id.*)

13. If the return show a valid and sufficient authority for continuing the custody and arrest of the prisoner, it is no ground for reversing an order dismissing a *habeas corpus* that the officer making the return had also arrested the prisoner on other similar warrants. (*Id.*)

13. On *habeas corpus* the officer issuing the writ may inquire whether there was any such indictment as is stated in the bench warrant, and whether the court in which it was found had jurisdiction of the subject-matter. (*Id.*)

14. The question as to the guilt of the prisoner cannot be inquired into on *habeas corpus*. (*Id.*)

15. Where one who has disobeyed a subpoena is proceeded against by indictment for a criminal contempt, the rules and tests applicable to a civil proceeding to punish such disobedience do not apply. (*Id.*)

16. Civil and criminal proceedings are entirely independent of each other. They may be prosecuted at the same time; and a conviction under one is no bar to a prosecution under the other. (*Id.*)

BILL OF PARTICULARS.

1. An unverified complaint in an action for slander set out four separate causes of action. The slanderous words set forth in the first were alleged to have been spoken on or about October 10, 1880; those in the second on or about July 10, 1880; those in the third on or about July 20, 1881, and those in the fourth on or about July 10, 1881. In each case the words were alleged to have been spoken at the town of Russell, and in the presence of "divers

good and worthy citizens." The defendant moved for a bill of particulars, alleging in his affidavit that he had no knowledge, information, belief or suspicion as to the times or places, or in whose presence the plaintiff expected to prove that he had made any of the statements or utterances alleged to have been made by him, and that a bill of particulars was necessary to enable him to properly prepare his answer, and prevent his being surprised at the trial.

The plaintiff's attorney made an affidavit, in the absence of his client, in which he stated that he believed the plaintiff to be ignorant of the times and places and to be unable to state them further than they were stated, but he further said that he had personally visited the witnesses by whom the slanderous utterances were to be proved, and knew what they would testify to:

Held, that a bill of particulars should be ordered. (*Gardiner agt. Knox*, 27 Hun, 500.)

2. Where, in an action brought to recover the price of wood sold to the defendant, the complaint alleges the delivery of the wood from time to time, and various payments made on account thereof, the plaintiff may, upon the demand of the defendant, be compelled to furnish a bill of particulars. (*Barkley agt. Renn. and Saratoga R. R. Co.*, 27 Hun, 515.)

3. Section 531 of the Code of Civil Procedure does not limit the right of the defendant to demand a bill of particulars to the case of an action upon an account stated; the word "account," as used therein, applies to almost every claim on contract which consists of several items. (*Id.*)

BOND.

1. In an action brought by a resident and taxpayer of a municipal

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corporation against the comptroller of such corporation, under the act for the protection of taxpayers (*Laws of 1881, chap. 531*), the plaintiff must, upon the commencement of such action, give a bond as in such act specified. (*Tappan agt. Crissey, ante, 496.*)

2. Such bond must be in the form prescribed by the act, and must be under seal. (*Id.*)
3. A compliance with sections 620, 621, of the Code of Civil Procedure as to security, does not obviate the necessity of complying with the provisions of this statute. (*Id.*)
4. Where a motion is made to dissolve an injunction granted under the act of 1881, without the giving of such a bond upon the commencement of the action, the court, at special term, has power in a proper case to permit such bond to be filed *nunc pro tunc*. (*Id.*)

BORROWER.

1. A legatee, devisee or executrix of a "borrower," is not a "borrower," within the usury laws, and cannot maintain an equitable action for relief against a usurious mortgage, without a tender before suit brought of the sum borrowed. (*Buckingham agt. Corning, ante, 508.*)
2. The rule of the construction of this statute, examined and explained. (*Id.*)

BURDEN OF PROOF.

1. In an action for the recovery of damages under an alleged breach of warranty :
Held, that upon the question as to whether there was a warranty or not, the plaintiff has the burden and must establish it by furnishing the preponderance of evi-

dence. (*Raines agt. Totman, ante, 498.*)

2. When the plaintiff swears unqualifiedly and explicitly to a warranty and the defendant swears unqualifiedly and explicitly swears there was not, and there is no evidence in the case corroborating the plaintiff, he fails to make out a case of warranty and defendant is entitled to judgment. (*Id.*)

CODE OF PROCEDURE.

1. Sections 99, 375, 379 — The statute of limitations was not a defense to a proceeding under the Code of Procedure (*sec. 375*), to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, unless such defense existed at the time the action was commenced. The action was commenced by service of summons on the joint contractor (*sec. 99*), and the proceeding was not a new action but a proceeding at the foot of the judgment.

The provision of said Code (*sec. 379*), giving to the one sought to be charged by such proceeding the right to set up any defense which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better. (*Maples agt. Mackey, 89 N. Y., 147.*)

2. Section 118 — During the pendency of this action, which was upon contract, the claim was assigned to J., who took the assignment at the instigation and request of T. & B., a firm of attorneys, and held it expressly in trust for them, he having no interest therein save as such trustee. J. having died, his administratrix, at the request of T. & B., assigned the claim to the present plaintiff who took expressly in trust for

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them, and was thereupon substituted as plaintiff:

Held, that plaintiff was trustee of an express trust within the meaning of this section of the Code of Procedure, and could, therefore, under it maintain the action without joining with him the persons beneficially interested in the claim, and in the absence of any allegation on the part of defendant of equities, set-off or counter-claim against them, their absence as parties could not harm or embarrass him; also that the claim, upon the death of J., passed to his legal representatives, and his administratrix could transfer the legal title, and as the transfer to plaintiff was made at the request of the sole beneficiaries, he had a perfect title and a sufficient standing to enable him to maintain the action. (*Westmore* agt. *Hogeman*, 88 N. Y., 69.)

8. Section 135 — Under the Code of Procedure, a money judgment against a non-resident upon whom there was no personal service of summons, but service was made by publication, and who did not appear in the action, cannot affect any property of the defendant except such as has been taken by virtue of an attachment regularly issued in the action.

The words "subject of the action" in the provision of said Code (sec. 135, sub. 3), in reference to service by publication, requiring it to be established before jurisdiction is given to grant an order for service upon a non-resident that "the court has jurisdiction of the subject of the action," are not identical with "cause of action," but are intended as words of qualification or limitation; they relate not to an action at law but to a suit in equity, the object of which is to give some specific relief rather than a simple judgment against property.

Accordingly *held*, that a sale of real estate belonging to the defendant under an execution issued

in an action against a non-resident wherein the service of the summons was by publication, and no attachment had been issued gave no title to the purchaser. (*McKinney* agt. *Collins*, 88 N. Y., 216.)

4. Section 186 — Under the provisions of this section of the Code of Procedure in reference to the discharge of a defendant, who has been taken into custody under an order of arrest, upon giving bail where a defendant has once given bail, which the sheriff has accepted, he has the absolute right to be at large until a failure of bail to justify as prescribed in said provisions. (*Artega* agt. *Conner* et al., 88 N. Y., 403.)

5. Sections 232, 236 — Under these sections of the Code of Procedure a debt evidenced by a negotiable security, owned by and in the hands of an attachment debtor, could be attached by serving the attachment upon the maker of the security.

While the attachment might be defeated by a subsequent transfer of the security to a *bona fide* holder for value, payment thereof by the maker to one, who to his knowledge did not hold it for value or in good faith, but simply for the benefit of the attachment debtor, was no defense to an action to enforce the lien of the attachment. (*Dills* et al. agt. *Nat. Park Bank of New York*, 89 N. Y., 343.)

CODE OF CIVIL PROCEDURE

1. Section 46 — After a decree of the surrogate of Rockland county, admitting a will to probate, had been affirmed on appeal by the general term and the court of appeals, it was discovered that the surrogate was, at the time of making the decree, largely indebted to the estate by reason of his having wrongfully converted to his own use securities of the estate

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deposited with him at the commencement of the litigation:

Held, that the surrogate in office at the time of such discovery properly granted an application to set aside the probate of the will and grant a new trial, on the ground that the first surrogate was, by reason of his interest in the matter, disqualified from hearing or determining it. (*Matter of Hancock*, 27 Hun, 78.)

2. Section 66—An attorney's lien under this section of the Code extends to both costs and services, and cannot be affected by any settlement between the parties.

The proper practice is for the attorney to proceed to collection of the judgment, to the extent of his lien, in the name of the client.

It is not necessary to serve a notice of lien. (*Albert Palmer Company* agt. *Van Orden*, ante, 79.)

3. Sections 438, 439—Upon an application made under these sections of the Code of Civil Procedure to procure an order for the service of the summons by publication upon a non-resident defendant, the affidavit alleged "that deponent knows the defendants personally, and knows that they are not residents of this State, but reside at Lynn, in the State of Massachusetts, and have engaged in business there under the firm name and style of J. Mahon & Sons. That plaintiff will be unable, with due diligence, to make personal service of the summons herein upon the defendants within this State."

Held, that the affidavit was sufficient to give the court jurisdiction over the matter. (*See Smith* agt. *Mahon*, 27 Hun, 40.)

4. Sections 438, 439—An order for the publication of a summons must be founded upon a verified complaint, showing sufficient cause of action against the defendant to be served.

Where a complaint was verified before a commissioner for the state of New York residing in Philadelphia, and no certificate of the secretary of state of the state of New York, certifying to the genuineness and official signature of the commissioner, was attached to the alleged verification:

Held, that such a complaint is not a verified complaint, and the justice who made the order for publication never acquired any jurisdiction to make this order. (*Williamson* agt. *Williamson*, ante, 450.)

5. Sections 440, 441, 787—Under these provisions of the Code of Civil Procedure in reference to service of summons by publication, such service is not complete until the expiration of at least six full weeks from the time of the first publication, or, when service is made out of the state, until the expiration of that period after such service.

Where, therefore, after the granting of an order of publication, summons was served on defendant out of the state on November 25, 1881, and judgment by default was entered January 20, 1882:

Held, that the judgment was premature; and that an order setting it aside was properly granted. (*M. N. Bank* agt. *P. N. Bank*, 89 N. Y., 397.)

6. Section 446—To an action of *quo warranto*, brought by the people upon the relation of one claiming to be entitled to an office held by the defendant, the claimant is, under the Code of Civil Procedure, a proper, if not a necessary party plaintiff. (*People ex rel. Petty* agt. *De Bevoise*, 27 Hun, 596.)

7. Section 498—Plaintiff's complaint set forth an agreement for the sale, to him, by defendant and her testatrix, "of a certain plantation known as Live Oaks, * * situated in the * * State of

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Louisiana," and asked to recover damages for an alleged breach of said agreement. The answer contained several counts or divisions. In the second the plantation is referred to as "Live Oaks mentioned in the complaint;" in the third the defendant denied that the "court had jurisdiction of the subject-matter of this action, as to the claim for damages for improvements * * to real estate, situate in the state of Louisiana." In the fourth, it was alleged that "while the plaintiff was in possession of the said 'Live Oaks' he unnecessarily injured and wasted the said plantation," and defendant asked to counter-claim the damages. Plaintiff demurred to the counter-claim, on the ground "that it appears that the court has no jurisdiction of the subject thereof." The demurrer was overruled upon the ground that the want of jurisdiction did not appear "upon the face of the counter-claim," as required by this section of the Code of Civil Procedure in order to sustain such a demurrer:

Held, error; that it did appear upon the face of the answer that the real estate was situate in another state; and that the court had no jurisdiction of a claim for damages by waste committed on land situated outside of this state. (*Cragin* agt. *Lovell*, 88 N. Y., 258.)

8. Section 550—Where a husband has without cause or provocation abandoned his wife and fraudulently disposed of his property in such a manner as that it cannot be appropriated to her support or to the payment of the debts she might contract on his credit for that purpose, he may be arrested under subdivision 2 of this section of the Code of Civil Procedure, in an action brought against him by one who has expended moneys in supporting and maintaining the wife while so abandoned (DAVIS, P. J., dissenting). (*Tunstall* agt. *Winston*, 27 Hun, 264.)

9. Section 531—Where, in an action brought to recover the price of wood sold to the defendant, the complaint alleges the delivery of the wood from time to time, and various payments made on account thereof, the plaintiff may, upon the demand of the defendant, be compelled to furnish a bill of particulars.

This section of the Code of Civil Procedure does not limit the right of the defendant to demand a bill of particulars to the case of an action upon an account stated; the word "account," as used therein, applies to almost every claim on contract, which consists of several items. (*Barkley* agt. *R. and S. R. R. Co.*, 27 Hun, 515.)

10. Section 542.—By obtaining an extension of time in which to answer, the defendant extends the time of the plaintiff to serve an amended complaint. (*Albert* *Pulmer Company* agt. *Shaw*, ante, 80.)

11. Sections 635, 633—An attachment is justified in favor of a creditor on a joint demand for goods sold and delivered when one of two copartners, who are jointly and individually insolvent, makes a fraudulent transfer of his interests in the firm to his copartner. (*Hirsch* agt. *Hutchison*, ante, 386.)

12. Sections 635, 636—Under the provisions of these sections of the Code of Civil Procedure, an attachment cannot be issued against the property of a defendant, in an action brought simply to recover damages for obtaining goods by false and fraudulent representations. (*Wittner* agt. *Von Minden*, 27 Hun, 234.)

13. Section 636—It need not appear from the affidavits used upon an application for an attachment, that the action has been commenced, or that a summons has been then issued. (*Pickhardt* agt. *Antony*, 27 Hun, 269.)

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14. Section 686—In an affidavit, upon which an application for an attachment was based, the cause of action was stated as follows: "The defendants owe my firm one thousand eight hundred and eight dollars and seventeen cents over and above all counter-claims known to plaintiff and to me, for goods, wares and merchandise sold and delivered by my firm to the defendants, who are copartners and were such during all the times herein mentioned, between January 8, 1880, and June 30, 1880. No part has been paid."

Held, that a cause of action was not stated with sufficient clearness to authorize the issue of an attachment. (*Pomeroy* agt. *Ricketts*, 27 *Hun*, 242.)

15. Section 688—Where, within thirty days from the time of the issuing of an attachment, the defendant appears by an attorney, who serves a formal notice of appearance in his behalf, it is not necessary to serve the summons upon the defendant, either personally or by publication, in the manner required by this section of the Code of Civil Procedure. (*Pomeroy* agt. *Ricketts*, 27 *Hun*, 242.)

16. Sections 648, 649, 677, 678—Prior and up to April 27, 1875, the N. O., St. L. and C. R. R. Co. had a deposit account with defendant; the deposit being made by R., its assistant treasurer, and its principal officer in New York, of whose official position defendant was fully informed; on that day said company having a balance to its credit drew its check for the amount, which was certified by defendant charged to the company and delivered to R. On April 30, 1875, an attachment against said company was served upon defendant by delivery of a copy with proper notice. The check at that time was still in the possession of R., and was owned by the company. On the same day, shortly after the service of

the attachment, and after R. had been informed thereof, he opened an account in his individual name, depositing to the credit thereof the said check and other negotiable securities drawn to his order as assistant treasurer, and belonging to said company. R. had no individual account prior to that date, and defendant had reason to and did believe that the securities were the property of the company, and that the deposit was intended to pay its debts; to which purpose it was afterward applied, being drawn out on the individual checks of R. In an action brought after the going into effect of, and pursuant to the provisions of the Code of Civil Procedure (*secs.* 677, 678), to recover the attached debt:

Held, that the plaintiffs were entitled to recover; that the certification of the check did not absolutely pay and discharge the deposit account, but the debt evidenced by it was liable to attachment; that the deposit of it by R. in his own name did not vest title in him, and as the debt remained the property of the company it was properly attached, and the checks having subsequently come to the hands of defendant, it was liable

As to whether the law in reference to attaching debts evidenced by negotiable securities has been changed by the Code of Civil Procedure (*secs.* 648, 649), *quære*. (*Bills et al* agt. *National Bank*, 89 *N. Y.*, 343.)

17. Section 645—No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff.

An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor.

Where, however, such an order

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had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein:

Held, that he was not aggrieved by the order and could not sustain an appeal therefrom, save so far as it imposed costs upon him. (*Hall agt. Brooks*, 89 N. Y., 83.)

18. Section 655 — Action by the sheriff to collect property attached — he will not be allowed to discontinue it when the debtor will be prejudiced thereby. (*Bowes agt. Knickerbocker Life Ins. Co.*, 27 Hun, 812.)

19. Section 682 — A receiver of an insolvent National bank, appointed after the issuing of an attachment against it, may, under this section of the Code of Civil Procedure move to vacate the attachment without being made a party to the action. (*Nat. S. and L. Bk.*, N. Y., agt. *Mech. Nat. Bk.*, N. J., 89 N. Y., 440.)

20. Section 721 — In an action originally commenced against two members of a firm upon a firm indebtedness, the defendants gave an undertaking to discharge an attachment, and thereafter, a plea in abatement having been interposed, the attorney for the original parties stipulated for the amendment of the summons and complaint, so as to bring in, as defendant, another, a partner in the firm. The summons was amended without the order of the court, or the consent of the sureties in the undertaking, by inserting the name of the third defendant, who voluntarily appeared in the action, and judgment was recovered against all three of the defendants. In an action upon the undertaking:

Held, that the amendment was not, in effect, the commencement of a new action, but simply the continuance of the old one; that the judgment, although it included

the added defendant, was a judgment against the original defendant within the meaning of the undertaking; and so, that defendants were liable.

Also *held*, that the fact that the summons was amended without the order of the court did not affect the validity of the judgment (3 R. S., 425, sec. 7; *Code of Civil Pro.*, sec. 721), and the parties, having consented to the amendment, could not object on the ground that no order was procured. (*Christal et al.*, agt. *Kelly et al.*, 88 N. Y., 285.)

21. Section 722 — Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$30,000." Upon the trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized.

Held, untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal.

Also *held*, that defendant was liable for the act of the conductor in throwing plaintiff from the car. (*Schultz agt. Third Avenue Railroad Co.*, 89 N. Y., 242.)

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23. Section 723—Plaintiff's counsel asked to have the complaint amended by this court, so as to designate F. as "record clerk of the court of special sessions:"

Held, that if the provision of this section of the Code of Civil Procedure, in reference to amendments, applies to this court, it should not be exercised save where no substantial right of the adverse party would be affected; that the case having been tried upon a different issue, the defendant succeeding upon grounds which tendered evidence on its part unnecessary, when, if an amendment had then been made, a different case might have been presented, the amendment could not be allowed here. (*Fitch* agt. *Mayor, etc., of the City of New York*, 88 N. Y., 500.)

23. Section 723—The provision of this section of the Code of Civil Procedure in regard to amendments, does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants. (*N. Y. S. M. Milk Pan Ass'n* agt. *Rem. Ag. W'ks*, 89 N. Y., 22.)

24. Section 757—When a motion to review may be made under this section on the death of all the plaintiffs in an action. (*McLachlin* agt. *Brett*, 27 Hun, 18.)

25. Section 817—When a plaintiff, as devisee, institutes separate actions for the partition of real property situated in different counties, and it appears that one of the defendants is only interested in the land situated in one county; that in such case the court has no power to consolidate said actions, but each of the same must be tried in the county where the land is situated. (*Mayor* agt. *Mayor, ante*, 230.)

26. Section 829—An attorney is not interested in an action by reason

of his lien for costs—personal transactions with a deceased person may be testified to by him—when, where he acts for both parties, the communications are not privileged. (*Sherman* agt. *Scott*, 27 Hun, 331.)

27. Section 829—In an action by the son, after the death of the father, against the executors to compel a cancellation of the mortgage, S., who was not a party to the action, but was a special and residuary legatee, was called as a witness for plaintiff to prove the declarations of the deceased. This evidence was objected to, objection overruled:

Held, no error; that it was not within the prohibition of this section of the Code of Civil Procedure, as the witness was not testifying in her "own behalf or interest;" as specific legatee she was totally unaffected, and as residuary legatee, her interest was against the validity of the gift which her evidence tended to establish. (*Carpenter* agt. *Soule*, 88 N. Y., 251.)

28. Section 829—Under the provisions of this section of the Code of Civil Procedure, prohibiting a party from testifying in his own behalf against an executor, &c., of a deceased person, "concerning a personal transaction, or communication between the witness and the deceased person," while a party is prohibited from testifying that any particular communication or transaction did or did not take place personally between him and the deceased, he is not precluded from testifying to extraneous facts which tend to show that a witness who has testified to such a transaction has testified falsely, or that it is impossible that his statement can be true. (*Pinney* agt. *Orth et al.*, 88 N. Y., 447.)

29. Section 829—W., a witness for plaintiff, testified to a conversation

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between himself and B., at a house where the sister of the latter lived, in which he stated that he had been married, but it wouldn't do to let "the women" know it. The defendants' counsel asked the witness if he did not have another conversation with B., in the presence of the sister of the latter, in which he stated that "he was not married;" this the witness denied. The sister was thereafter called as a witness for the defense, and was asked as to such a conversation. This was objected to generally; the court admitted it to contradict W. "and not as a declaration of deceased."

Held, that the evidence was relevant and material, and so a general objection was not tenable.

Also *held*, that defendant was not bound by the answer of W., as the evidence was not collateral but bore upon the issue; and that the sister was a competent witness under this section of the Code, as it was not a personal transaction between her and deceased. (*Badger* agt. *Badger et al.*, 88 N. Y., 546.)

30. Section 885—The affidavit upon which an attachment is applied for should be explicit and state in clear and concise terms a cause of action, and such facts as will satisfy the court or officer to which or to whom the application is made of the intent and attempt of the defendant to cheat and defraud his creditors. In general these facts should be stated upon positive knowledge, but when, from the circumstances of the case, they cannot be so stated they may be stated upon information and belief, giving the names of the persons and the sources from which the information is derived and the reasons why the affidavits of those having positive knowledge cannot be procured.

Where the party having positive knowledge of the facts refuses to make an affidavit the applicant is not obliged to procure an order, under this section of the Code of

Civil Procedure, requiring him to appear before a referee and submit to an examination. (*Bennett* agt. *Edwards*, 27 Hun, 353.)

31. Sections 887 to 913—The provisions of the Code of Civil Procedure, in reference to taking depositions out of this state (*secs.* 887 *et seq.*), relate to actions only. (*Champlin* agt. *Stodard*, *ante*, 378.)

32. Section 982—The general rule of law, that actions for injuries to real estate must be brought in the forum "*rei sita*," was not changed by the provision of this section of the Code of Civil Procedure, in reference to the place of trial of actions relating to real property. (*Cragin* agt. *Lovell*, 88 N. Y., 258.)

33. Section 1021—The general term of the supreme court, on affirmation of an order overruling a demurrer to the complaint in an action, has the same power before possessed by the special term, under this section of the Code of Civil Procedure, to designate what kind of an interlocutory judgment and final judgment shall be entered. (*Smith et al.*, agt. *Rathbun et al.*, 88 N. Y., 660.)

34. Section 1041—Chapter 533 of the Laws of 1881, amending this section, in so far as it provided for the selection of grand jurors in and for the city and county of Albany, held to be constitutional. (*The People* agt. *Petrea*, *ante*, 139.)

35. Section 1268—Judgment was recovered against the defendant on March 10, 1876, on a debt contracted prior to February 26, 1876, upon which date defendant was adjudicated a bankrupt. On July 31, 1876, defendant obtained his discharge in bankruptcy:

Held, first. That the judgment was not such a merger of the indebtedness as to create a new debt, and that the debt as well as the judgment were necessarily dis-

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charged by the bankruptcy proceedings.

Second. That this section of the Code of Civil Procedure is imperative and absolutely entitles defendant to an order canceling the judgment from the docket.

Third. That a rehearing of a motion may be had before a court held by the judge who heard the original motion, either upon the original papers or upon new papers. (*Arnold* agt. *Oliver*, ante, 452.)

36. Section 1274 — Confession of judgment — requisites of the statement upon which it is entered. (*Marrin* agt. *Marrin*, 27 *Hun*, 601.)

37. Sections 1801, 1816 — Notice of appeal — it must specify the intermediate orders sought to be reviewed — the court cannot allow them to be inserted in the notice, after the time to appeal has expired. (*Piper* agt. *Van Buren*, 27 *Hun*, 384.)

38. Sections 1335, 1352 — Sureties to an undertaking given on appeal to the general term of the supreme court, or of a superior city court, when excepted to, and they fail or refuse to justify, and justification is not waived by the respondents, are not bound by the conditions of their undertaking.

Defendants were sureties upon an undertaking on appeal, and were excepted to; G., learning of his principal's death during the examination, refused to go on or remain on the bond. The other defendant refused to appear. Plaintiff took no measures to complete the examination. In an action on the undertaking:

Held, that defendants were not bound by its conditions. (*Manning* agt. *Gould*, ante, 429.)

39. Sections 1342, 3063, 3068, 3063, 2940, 2949 — Defendant served in time regularly a notice of appeal from a justice's judgment, to the county court, and in the notice of

appeal inserted the words, viz: "Said appellant hereby demands a new trial in the appellate court." Thereupon, the plaintiff, upon an affidavit and notice of motion, asked the county court to dismiss the appeal. The notice of motion points out no irregularity or grounds for dismissing the appeal to the county court. But the affidavit used upon the motion referred to the pleadings in the justice's court, and added that the plaintiff was informed by counsel, and verily believe that a new trial of such action could not be claimed or had in the county court, and that said appeal is unauthorized by law and cannot be sustained. On motion of plaintiff the appeal was dismissed, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of the motion. On appeal from such order:

Held, first, that the order made by the county court, dismissing the defendant's appeal to that court, is appealable.

Second. No sufficient reason was presented to the county court for dismissing the appeal, unless the defendant amend his answer and pay plaintiff's attorney ten dollars costs of motion.

Third. The appeal to the county court was regular, and the appellant was entitled to have either a new trial in that court, or a hearing and consideration by the county court of the questions of law presented by the appeal.

Fourth. The defendant had, by his answer, denied all the allegations of the complaint, and that formed an issue upon which he was entitled to have his appeal determined without an amendment, even if the second branch of his answer was defective. This would be so whether there was a new trial in the county court or simply a hearing of the appeal upon the questions of law. (*Mattison* agt. *Hall*, ante, 515.)

40. Sections 1358, 1856, 1361 — Where

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In a proceeding under the assignment act to compel the attendance of one of the assignors before a referee for examination respecting a trade-mark, as a witness, on the application of creditors, two appeals are taken by the assignor, namely, one from an order denying a motion to set aside the original order directing such examination, and the other from an order denying a motion for a stay of proceedings and leave to apply to another judge for such stay, the papers on the two appeals are bound up and served together:

Held, the papers on appeal are obnoxious to the objection of respondent's motion that they be separated. The papers submitted on each order should be separated.

Where, in such case, an opinion was filed by the court below, giving reasons for the decision of the motion, the opinion should be inserted as a part of the papers set up for review to the general term.

Where papers are inserted which were never used nor submitted at special term, a motion to suppress them will be granted by the judge who heard the motion on settlement. Adjournments indorsed on the papers used by the court below must appear before the appellate court, where they are claimed to be essential. (*In re the Assignment of Sweeney, ante*, 381.)

41. Section 1440 — The provision of this section of the Code of Civil Procedure, as amended by section 2, chapter 681, Laws of 1881, providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, &c., has no application in an action wherein relief is sought against a fraudulent act of such grantee.

(*McIntyre agt. Sandford et al* 39, N. Y., 634.)

42. Section 1464 — The legal title to a judgment recovered in an action brought by the surviving member of a firm, in his name as survivor, is in the plaintiff the same as if the cause of action had been in his own right.

Where, therefore, one claiming to redeem lands sold under execution delivered to the sheriff a certified copy of the docket of a judgment in which he, as survivor of himself and another named, was described as plaintiff, and also an affidavit to the effect that he was the owner and holder of the judgment mentioned in the copy of the docket, and that there was due thereon an amount specified.

Held, that the papers were sufficient under this section of the Code of Civil Procedure to entitle him to redeem; that it was not necessary to present any assignment of the judgment to himself or to add to the statement in the affidavit any words showing his identity with the judgment creditor, as he appeared upon the face of the papers to be the owner of the judgment. (*Nehrboss et al agt. Bliss et al.*, 88 N. Y., 600.)

43. Sections 1693, 416 — Action to recover the possession of personal property, a seizure of the chattels gives the court jurisdiction of the action. (*Acker agt. Haulemann*, 27 Hun, 48.)

44. Section 1778 — In a suit against a domestic corporation, brought in the marine court, the time in which an order, under this section of the Code of Civil Procedure, must be served, is limited to six instead of twenty days. (*Schlegel agt. American Beer and Ale Bottling Company, ante*, 196.)

45. Section 1778 — In an action against a foreign or domestic corporation, to recover damages for

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the non-payment of a promissory note, &c., * * * unless the defendant serves, as required by this section of the Code of Civil Procedure, with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of the complaint.

The service of a copy of such an order is not restricted to cases where the defendant's corporation has asked for and obtained an extension of time to answer or demur from this court, but it is necessary in all cases. (*Hutson et al. agt. Morrisania Steamboat Company, ante, 268.*)

46. Section 1778 — A policy of life insurance is not an "evidence of debt for the absolute payment of money upon demand or at a particular time" within the meaning of the provision of this section of the Code of Civil Procedure, declaring that in an action against a corporation upon such an obligation, unless defendant serves with its "answer or demurrer a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of default," &c.; and this although the policy has become due by the death of the insured.

The provision applies only to instruments which admit on their face an existing debt payable absolutely. (*N. Y. L. Ins. Co. agt. Universal L. Ins. Co. et al, 88 N. Y., 424.*)

47. Section 1780 — A national bank, organized under the laws of congress and located within this state, is, within the meaning of the Code, a domestic corporation, and may sue here a national bank without the state, or any foreign corporation, for any cause of ac-

tion. (*Market National Bank agt. Pacific National Bank of Boston, ante 1.*)

48. Section 1948 — Prior to the adoption of the present Code of Civil Procedure, it was well settled that the title to a public office in this state could only be tried in an action brought in the name of the people of the state by their attorney-general.

Under the Code of Civil Procedure, the people are necessary parties to an action to try the title to an office. The rule is the same where the title is to be tried indirectly, as in an action to enjoin the incumbent. Section 1948 expressly provides that such an action must be brought in the name of the people of the state. (*Morris agt. Whelan, ante, 109.*)

49. Sections 1780, 266, 267 — The superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer. (*Brooks et al. agt. Mexican National Construction Company, ante, 864.*)

50. Sections 1798, 1799, 1948 — It is not necessary for the attorney-general to obtain the leave of the court to bring an action, under section 1948 of the Code of Civil Procedure, against persons assuming to act as a corporation within this state without being duly incorporated.

The court at general term will not reverse upon appeal an order made by the court, under section 1799 of the Code of Civil Procedure, granting leave to the attorney-general to bring an action to procure a judgment vacating the charter, or annulling the existence of a corporation, for one of the reasons specified in section 1798 of the said Code, unless, perhaps, in an extreme case where

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the complaint is on its face wholly without foundation. (*People* agt. *Boston, Hoosac T. and W. R. R. Co.*, 27 Hun, 528.)

51. Section 2017— Under the Revised Statutes, a justice of the supreme court had power to allow the writ of *habeas corpus* in whatever part of the state the prisoner might be detained.

Under the Code of Civil Procedure, a justice of the supreme court in any part of the state may issue the writ. (*The People* ex rel *Clarke* agt. *Clarke*, ante, 7.)

52. Sections 2045, 2046, 2061, 2062— A relator for a *habeas corpus* who is remanded to custody on a bench warrant, and desires a stay under these sections of the Code of Civil Procedure, pending an appeal to the court of appeals, must himself personally execute the recognizance within the jurisdiction of the court. (*The People* ex rel. *Sherwin* agt. *Mead*, ante, 252.)

53. Section 2238— When the time of a justice is required and devoted to other business, having precedent demands upon him as a member of the court, he is reasonably excusable for not entertaining an application by a landlord to remove a tenant under the statute relating to summary proceedings.

While the language of the act is mandatory in its terms, it could not have been intended to deprive the justice of the discretion vested in judicial officers.

The allowance of the writ of *mandamus* is discretionary, and the discretion will not be exercised against a judicial officer in such a case. (*The People* ex rel. *Kavanagh* agt. *McAdam*, ante, 238.)

54. Section 2245— An injunction will not be granted to restrain the execution of a warrant issued in a proceeding for forcible entry and detainer, pending an appeal from the judgment entered in said pro-

ceeding. (*Coster* et al. agt. *Van Schaick* et al., ante, 100.)

55. Sections 2323, 2325, 2327, 2328— In proceedings instituted for the purpose of inquiring as to the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind, to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate. A commission thereupon issues to one or more commissioners, who caused a jury to be summoned, before whom the investigation is had. This was the course pursued in this case, and on the hearing before the jury various objections were taken to the admission of evidence, and at the close of the proof counsel for the alleged lunatic insisted upon the right to address the jury on his behalf, which was refused by the commissioner. On motion to confirm:

Held, that the refusal of the commissioner to allow the counsel for the alleged lunatic the right to address the jury upon the evidence is error and fatal to the motion to confirm the findings of the jury. (*Matter of Church*, ante, 393.)

56. Sections 2325, 2335— The failure of the court to require notice of an application for the appointment of a committee of an alleged lunatic to be given to the husband, wife or one or more of the relatives of the lunatic, as required by section 2325 of the Code of Civil Procedure, where sufficient reasons for dispensing therewith are not set forth in the petition or accompanying affidavit, does not deprive it of jurisdiction over the matter, but is a simple irregularity which may be cured or disregarded.

It is sufficient if upon the hearing of a motion, made by the alleged lunatic, to set aside the

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order appointing the commission, all the parties interested have an opportunity to be heard.

Since the adoption of section 2335 of the Code of Civil Procedure the inquiry must be confined to the incompetency of the person at the time the inquisition is held, and it is erroneous to include in it a statement that the incompetency existed for any definite period prior thereto. (*Mutter of Demelt*, 27 Hun, 480.)

57. Section 2455 — *It seems*, also, to be proper for a surrogate, in a decree which charges an executor with a debt due from him, to specify the charge thus made separately, so as to protect his rights. (*Backus* agt. *Stover*, 89 N. Y., 1.)

58. Section 2545 — Under the provision of this section of the Code of Civil Procedure, declaring that the decree of a surrogate "shall not be reversed for an error in admitting or rejecting evidence unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby," to justify a reversal it must appear that had competent evidence, which was rejected, been received, the appellant's case would not have failed, or without improper evidence which was received, the respondent's case was deficient. (*Snyder* agt. *Sherman et al.*, 88 N. Y., 656.)

59. Sections 2550, 2585, 2589, 2640 — Where upon an appeal from a decree of a surrogate, denying a petition to compel the payment of legacies, on the ground that the claim is barred by the statute of limitations, the general term affirms the judgment, it may award costs at the same rates as are allowed upon an appeal from a judgment. (*Cole* agt. *Terpenning*, 21 Hun, 111.)

60. Section 2644 — A creditor having only an inferior right to administration, dependent on the renun-

ciation or disavowal of the right by all others who had a prior right, must proceed by petition and citation; and since by this section of the Code of Civil Procedure, it is provided that "the petition must pray that all persons having a prior right, who have not renounced, be cited to show cause why administration should not be granted to the petitioner," a creditor cannot take a citation to show cause why administration should not be granted to the public administrator. The proposed administrator, with the will annexed, must himself be a petitioner. (*Mutter of Batchelor*, ante, 350.)

61. Section 2662 — The provision of the act of 1867 in reference to the authority and jurisdiction of surrogates (*sec. 2, chap. 783 Laws of 1867*), which provides that a married woman shall be capable of acting as an administratrix and of receiving letters as such the same as if unmarried, did not repeal the provision of the Revised Statutes (2 R. S., 74, *sec. 28*), giving a preference in the granting of administration to unmarried over married women of equal degree of kindred.

The said act frees the married woman from pre-existing disabilities and so can have effect without disturbing the statutory order of appointment, and the two enactments are not necessarily inconsistent.

Accordingly held, where a surrogate issued letters of administration to one of two sisters who was unmarried, without notice to the other, who was married, that the provision of this section of the Code of Civil Procedure requiring notice to every person having a prior or equal right did not apply and that the appointment was valid. (*In re Curser*, 89 N. Y., 401.)

62. Sections 2717, 2718, 2734, 2804 — The will of D. gave to his executors in trust a sum specified,

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which was stated to be "now invested on bond and mortgage" to hold as "invested during the continuance of the trust, and whenever the principal sums composing the trust shall be paid to invest," etc. The executors were directed to pay to certain beneficiaries named interest annually on designated portions of the fund during the period of five years after his decease, and at the close of that period to pay over to said beneficiaries respectively the principal sums upon which interest was so directed to be paid. In proceedings under the Code of Civil Procedure (*secs.* 2717, 2718), to compel the surviving executor to pay the said legacies, the answer of the defendant, which was duly verified, set forth in substance, that with the assent of the residuary legatees, sufficient assets to provide for the trust were separated from the body of the estate and transferred to a separate account kept by the executor as trustee, and were thereafter kept separate, that he regularly paid the interest on the legacies, and at the end of the five years paid the principal, deducting therefrom one per cent of the principal and interest, which he retained as commissions. The retention of this sum was objected to by the legatees, but the trustee refused to pay any part of the legacies until his right to such commissions should be determined; and thereupon the legatees withdrew their objections, received their legacies, less the commissions, and gave receipts in full. The answer also denied "the validity or legality of the petitioner's claim." The claim was for the sum so retained as commissions:

Held, that the surrogate erred in directing payment; that as the facts set forth in the answer "show that it is doubtful whether the petitioner's claim is valid and legal," and as the answer denied "its validity or legality," the pe-

tition should have been dismissed (*Code, sec.* 2718); that it was at least doubtful whether defendant was not entitled to retain his commissions out of the trust fund, and also as to whether the legatees were not precluded, having accepted the payment and received in full without applying for an accounting as they might have done (*Code, secs.* 2721, 2804), and thus have had a final disposition of the question. (*Hurlburt agt. Durant*, 88 N. Y., 121.)

63. Sections 3017, 3022, 3200, 3220, 2895 — Though under the district court acts there could be no execution against the person in an action in the district courts, unless the action had been commenced by warrant; since the enactment of the Code of Civil Procedure, which requires all actions to be begun by the service of summons, the right to a judgment making defendant liable to execution against his person depends upon the nature of the action, and not upon the manner of commencing it. (*Searing agt. Goodstein, ante*, 427.)

64. Section 3070 — The plaintiff having recovered a judgment for nine dollars and eight cents in a justices' court, the defendant appealed therefrom to the county court, where a verdict was rendered in his favor; no offer was made by the plaintiff as provided for in this section of the Code of Civil Procedure:

Held, that the defendant was entitled to have the costs taxed in his favor. (*Snyder agt. Hughes*, 27 Hun, 373.)

65. Section 3070 — The costs of an appeal taken from a justice's court before, but heard and decided in the county court after, the Code of Civil Procedure took effect, must be allowed and taxed under this section of the Code of Civil Procedure, and not under section 871 of the old Code.

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Costs in the end will be granted or refused in accordance with the law existing when the party has the right to costs. (*Garling* agt. *Ladd*, 27 *Hun*, 112.)

66. Section 3070 — In an action brought by the plaintiff in a justice's court to recover fifty dollars for work, labor and services performed for and rendered to the defendant, the latter set up a counter-claim of sixty dollars for goods sold and delivered. The plaintiff recovered a judgment for eight dollars damages and three dollars costs, from which the defendant appealed to the county court, where a new trial was had, and a verdict of "no cause of action" was rendered by the jury:

Held, that this section of the Code of Civil Procedure only applied to cases in which some judgment is recovered by the respondent, and that the defendant was entitled to the costs of the trial in the county court (*CULLEN*, J., dissenting). (*Quick* agt. *Wison*, 27 *Hun*, 592.)

67. Sections 3222, 3230 — Where, in an action in which costs are in the discretion of the court, a judgment is rendered in the supreme court, without any provision for costs, and on appeal to the court of appeals such judgment is affirmed, with costs, the only costs recoverable are the costs in the court of appeals.

The defendant H. had assigned a mortgage to the insurance company, with guaranty of payment. The plaintiff, as the receiver of the insurance company, commenced an action to foreclose the mortgage, making H. a party defendant. H. defended upon the ground that his guaranty of payment was discharged by the neglect of the company to foreclose, as he requested it to do. His defense was sustained at both circuit and general term, but overruled in the court of appeals, which court "did order and adjudge that the

judgment of the general term of the supreme court appealed from as relates to defendant H. be and the same is hereby reversed and modified by inserting a provision adjudging the defendant liable for any deficiency, and, as so modified, affirmed, with costs to the appellant."

Held, that as the judgment of the lower court is modified so as to render a judgment in favor of the plaintiff, but without costs, and as so modified is affirmed, with costs to the appellant, costs in the court of appeals only, and no other are given.

First. The plaintiff was not entitled to recover costs in the supreme court as of course.

Second. The supreme court neither at special or general term has awarded them.

Third. The court of appeals has awarded costs only in that tribunal; and,

Fourth. As costs have never been allowed for the proceedings in this court, the allowance of them to the plaintiff by the clerk was erroneous. (*Newcomb* agt. *Hale* ante, 400.)

68. Section 3235 — Where the plaintiff commenced an action against the defendant in a justice's court, for a trespass on lands, and the same having been discontinued by a plea of title, the plaintiff brought the present action in this court for the same cause, and the like defense was interposed here. The plea of title was accompanied in each court by a general denial. At the trial at the circuit, the plaintiff gave no evidence tending to the trespass alleged in the complaint, and thereupon the court, on motion of the defendant dismissed the complaint, no evidence whatever having been offered by the defendant:

Held, that the trial at the circuit was not the trial of an issue of fact, within the meaning of this section of the Code of Civil Procedure, and the case is not within the exception made by this section, and

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the defendant and not the plaintiff is entitled to costs. (*Gates* agt. *Canfield*, ante, 81.)

69. Section 8246 — Executors and administrators suing in their representative characters, *unnecessarily*, in cases where the cause of action (if any) accrues to them in their individual right, and failing to recover, are personally liable to the defendant for costs.

Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action rests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form in his representative capacity, *unnecessarily*, if he fails to obtain judgment.

In such case the defendant may enter judgment against the plaintiff for costs without an order of the court permitting him to do so. (*Feig* et al. agt. *Wray*, ante, 391.)

70. Section 8271 — Excise law — a person bringing an action in the name of the board should not be required to give security for costs. (*Commissioners of Excise* agt. *McGrath*, 27 *Hun*, 425.)

71. Section 8271 — This section of the Code of Civil Procedure authorizing the court, in its discretion, to require an executor or administrator to give security for costs, only applies to actions originally brought by or against an executor or administrator, and not to an action originally brought by the deceased, and simply revived in favor of his personal representatives. (*Sullivan* agt. *Remington Sewing Machine Co.*, 27 *Hun*, 270.)

72. Section 8307 — Under subdivision 2 of this section of the Code of Civil Procedure the sheriff, upon the settlement of an action in which a levy has been made under an attachment issued therein, is entitled to poundage

upon the value of the property attached not exceeding the sum at which the settlement is made, together with his fees for serving the attachment and making a levy and return. (*Woodruff* agt. *Imperial Fire Ins. Co.*, 37 *Hun*, 329.)

73. Section 8307 — The method of adjustment, by taxation, of sheriff's fees on execution, applies only to such items as are prescribed by law; it has no application to an item the amount of which depends upon agreement.

Upon such a taxation, therefore, the sheriff is not entitled to an allowance for "auctioneer's" fees or for "keepers'" fees, save "where an execution has been staid after levy," and under the provision of this section of the Code of Civil Procedure (*sub. 7.*) an allowance has been made by "the court or a judge thereof" to the sheriff "for his trouble and expense in taking care of and preserving the property." (*McKeon* agt. *Horsfall*, 88 *N. Y.*, 429.)

CODE OF CRIMINAL PROCEDURE.

1. Sections 228, 238, 239, 258, 268, 273, 285, 312, 313, 331, 322, 332, 333, 334, 339, 339, 362, 363, 364, 365, 366, 375, 377, 453, 465, 517, 562 — Practice as to grand jurors under these sections. (*The People* agt. *Petrea*, ante, 139.)

2. Sections 801, 803 — Sections 301 and 302 of the Code of Criminal Procedure do not, by section 962, apply to indictments found before such Code took effect.

Sections 301 and 302 only apply to the form of a bench warrant to be issued by the clerk, on the application of the district attorney, in cases where the prisoner has been let to bail, or has deposited money instead thereof, and has failed to appear in pursuance of his recognizance.

When the district attorney him-

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self issues the bench warrant, he is not required to follow the form provided in section 301. (*The People ex rel. Sherwin agt. Mead, ante, 41*)

3. Section 465—Subdivision 6 of this section of the Code of Criminal Procedure confers the power to grant a new trial in criminal cases, when the verdict is contrary to law or clearly against evidence, only upon the court in which the trial was had. No such power is conferred upon an appellate court.

In this case an examination of the evidence having shown such a conflict between the witnesses as to create a doubt as to the propriety of the conviction, the general term affirmed the conviction, without prejudice however to a motion to be made in the court of general sessions, where the trial was had, for a new trial. (*Sawyer agt. People, 27 Hun, 286.*)

4. Section 543—By this section of the Code of Criminal Procedure it is made the duty of the appellate court, when an erroneous judgment has been entered upon a lawful verdict, to correct the judgment in such manner as to make it conform to the verdict.

It is no longer proper to remit the case to the trial court to have the proper judgment pronounced, as was required by chapter 226 of 1868. (*People agt. Griffin, 27 Hun, 595.*)

5. Sections 887, 899, 99, 901, 64, 74, 962, 963—Since the enactment of the Penal Code, police magistrates have the right to commit persons for disorderly conduct, in default of bail for good behavior.

The power possessed by police justices under the former statutes to order persons convicted of disorderly conduct to find surety for their good behavior for a period not exceeding twelve months, and to stand committed for a period not exceeding twelve months, in default of giving surety, has not

been affected by the Code of Criminal Procedure, or by the Penal Code. (*Matter of McMahon, ante, 285.*)

CODE (PENAL).

1. Sections 201, 724, 725, 726—Since the enactment of the Penal Code, police magistrates have the right to commit persons for disorderly conduct, in default of bail for good behavior.

The power possessed by police justices under the former statutes to order persons convicted of disorderly conduct to find surety for good behavior for a period not exceeding twelve months, and to stand committed for a period not exceeding twelve months, in default of giving surety, has not been affected by the Code of Criminal Procedure, or by the Penal Code. (*Matter of McMahon, 285.*)

COMMISSION.

1. The power of this court to award a commission, without the consent of parties, to take the testimony of a witness out of this state, depends entirely on statute, and can only be exercised in the cases therein specified. (*Champlin agt. Stodart, ante, 378.*)
2. The provisions of the Code of Civil Procedure, in reference to taking depositions out of this state (*sec. 887, et seq.*), relate to actions only. (*Id.*)
3. Supplementary proceedings are special proceedings, and a commission cannot be issued to take the testimony of a foreign witness in such proceedings. (*Id.*)

COMMITMENT.

1. Where the petition on application for a writ of *habeas corpus* to in-

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quire into the cause of detention of one confined in a penitentiary did not allege that the relator was detained without a proper warrant of commitment, and the writ did not require the keeper to return the warrant or other instrument under and by virtue of which he detained the relator, but simply required a return of the cause of his imprisonment:

Held, that certified minutes of the court showing judgment and the sentence imposed sufficiently answered the writ, and the keeper was not required to return the warrant. (*People ex rel. Trainor* agt. *Baker*, 89 N. Y., 460.)

2. *It seems*, that a warrant of commitment in such case is simply an authority and direction to the sheriff or other officer to take the prisoner to the penitentiary; he is not detained by virtue thereof, but by virtue of the judgment, and if the officer furnishes the keeper with a certified copy of the judgment, it is sufficient evidence of his authority, and he need not retain the *mittimus*. (*Id.*)

3. *It seems*, also, if the prisoner has been properly and legally sentenced to prison he cannot be released, because of a defect in the *mittimus*. When he is safely in the proper custody, there is no office for a *mittimus* to perform. (*Id.*)

COMPLAINT.

1. Where all the allegations of a complaint are stated to be on information and belief, it is a sufficient verification that the complaint is true as the affiant is informed and believes. (*Orvis* agt. *Goldschmidt et al.*, ante, 71.)

2. The complaint alleged, in an action for conversion, that "plaintiff deposited for safe keeping with the said defendant, as plaintiff's broker, certificates for 1,000 shares" of mining stock, "and the

said defendant thereupon accepted the custody of said stock certificates, and promised and agreed to and with the plaintiff to keep the said stock for the plaintiff, and to hold the same for the plaintiff, subject to the plaintiff's orders and instructions:"

Held, that an order of arrest granted in the case must be vacated, because the complaint fails to state a cause of action, in that there is no allegation of ownership by the plaintiff of the certificates of the stock. (*Wright* agt. *Field*, ante, 117.)

3. In an action for the foreclosure of a mortgage, where the complaint alleges the giving of a bond, there must be an allegation of default in the performance of the condition of the bond. (*Coulter* agt. *Bower et al.*, ante, 123.)

CONSOLIDATION OF ACTIONS.

1. When a plaintiff, as devisee, institutes separate actions for the partition of real property situated in different counties, and it appears that one of the defendants is only interested in the land situated in one county; that in such case the court has no power to consolidate said actions, but each of the same must be tried in the county where the land is situated. (*Mayor* agt. *Mayor*, ante, 230.)

CONSTITUTIONAL LAW.

1. So much of chapter 456 of the Laws of 1881, for the removal of the Forty-second street reservoir, in the city of New York, as provides for the conversion of land into a public park, is unconstitutional, because it is in violation of the third article of the state constitution, which declares "that no private or local bill which shall be passed shall embrace more than one subject and that shall be ex-

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- pressed in the title." So much of the act as relates only to the removal of the reservoir cannot be saved, because, standing alone, it merely orders, without cause, the destruction of valuable property, and hence is not in the line of legitimate and intelligent legislation. (*Webb et al. agt. The Mayor. et al., ante, 10.*)
2. The corporation of New York, by virtue of its ancient charters, confirmed by the constitution, is the owner in fee simple of the lands in question, and the legislature has no power to order the demolition of the structure thereon, except for public purposes and upon making just compensation. Though doubtless competent, when the British rule ceased, for the state to take away from the city of New York its property rights and privileges, yet not having done so, and having recognized such rights by the Constitution of 1777, and having become amenable to the provisions of the Constitution of the United States of 1787, by which it was prohibited to pass any law impairing the obligations of contracts, it is not competent for the state, under cover of exercising political powers, to take away the city's vested rights of property. Such rights are as indestructible by legislative act as are the property rights of citizens. (*Id.*)
 3. The common-law duties of a constitutional officer elected by the people cannot be transferred by the legislature to an appointed officer. (*The People ex rel. McEwan agt. Keeler, ante, 478.*)
 4. Section 1 of article 10 of the constitution of this state provides for the election by the people of sheriffs, fixes the term of office, &c., but does not define the powers, rights or duties belonging to the office. In construing this section it must be held that it was intended to invest the office of sheriff with the functions given to it by the common law. By the common law the sheriff is the keeper of the common jail. A legislative enactment, therefore, that assumes to take away the custody of the jail and of the prisoners from a sheriff, giving such custody to the superintendent of a penitentiary who is appointed by a county board, is an infraction of this section and void. (*Id.*)
 5. The legislature may declare what building shall constitute the county jail if the custody of the building and of the prisoners therein remain with the sheriff. (*Id.*)
 6. Chapter 251 of the Laws of 1882 adjudged unconstitutional. (*Id.*)

CONTEMPT.

1. Where one is served in the city of New York with a subpoena issued by a court in Albany county, and fails to obey it, he is guilty of a criminal contempt, for which he may be indicted in Albany county. (*The People ex rel. Sherwin agt. Mead, ante, 41.*)
2. Personal presence at the place where the crime is perpetrated is not indispensable to constitute an offense. (*Id.*)
3. Failure to attend the court in Albany county impeded and delayed the administration of justice at that place, and the law presumes the accused intended that his behavior should have that effect. (*Id.*)
4. Where one who has disobeyed a subpoena is proceeded against by indictment for a criminal contempt, the rules and tests applicable to a civil proceeding to punish such disobedience do not apply. (*Id.*)
5. Civil and criminal proceedings are entirely independent of each

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other. They may be prosecuted at the same time; and a conviction under one is no bar to a prosecution under the other. (*Id.*)

CONTRACT.

1. In an action against a married woman to recover for alleged breach of contract by her to sell mining property in the territory of Arizona, a defense set up by her that, according to the laws of Arizona, her interest in the mine was subject to the absolute control of her husband is insufficient in law if not appearing by the pleadings that defendant is a resident of Arizona, and the contract having been made in the city of New York. (*Alexander* agt. *Shilaber*, ante, 530.)

CORPORATIONS.

1. In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, &c., * * * unless the defendant serves, as required by section 1778 of the Code of Civil Procedure, with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of the complaint. (*Hutson et al.*, agt. *Morrisania Steamboat Company*, ante, 263.)
2. The service of a copy of such an order is not restricted to cases where the defendant's corporation has asked for and obtained an extension of time to answer or demur from this court, but it is necessary in all cases. (*Id.*)
3. The directors of a corporation, when they find that the corporation is insolvent; that its affairs

are growing worse every day; that the danger is imminent; that the remaining property will be wasted, leaving the bulk of its creditors unpaid, may lawfully resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors, and such resignation becomes effective to vacate the respective offices without any affirmative act of the corporations. (*Smith* agt. *Danzig et al.*, ante, 820.)

4. The capital stock of a corporation is properly assessed at its actual and not its par value. (*The People ex rel. Panama R. R. Co.* agt. *Commissioners of Taxes*, ante, 405.)
5. Acts of a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on these acts. It is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an acquiescence in it, and if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the stockholders will be estopped from questioning it. (*Sheldon Hat Block Co.* agt. *Eckmeyer Hat Blocking Machine Co.*, ante, 467.)
6. While it is true that directors and trustees of a corporation are its agents to advance the purposes and objects of its organization, and have no authority, in virtue of their office, to perform acts, which to all intents and purposes,

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terminate the corporation by taking away from it the power to accomplish the object of its formation; yet it is the duty of the trustees of a corporation to pay its debts and to apply the corporate property to this end, although it should exhaust them, and thus disable the corporation from carrying on its business. (*Id.*)

7. The plaintiff, a corporation formed for the purpose of blocking and shaping hats, and making and licensing machines for stretching hats, for which it had letters patent, was prosecuted in the federal courts by the defendant corporation, for an infringement of its letters patent for stretching hats; the action resulted in a decree by which it was adjudged that the plaintiff's process was an infringement of the defendant's process, and it was perpetually enjoined from using the same, and it was adjudged to pay the sum of \$97,000 as damages for the infringement, which plaintiff was unable to pay. Whereupon the trustees of the plaintiff entered into negotiation with the trustees of the defendant corporation for a settlement of the damages, which resulted in an agreement that the plaintiff should transfer to the defendant corporation its patents for blocking, as well as those for stretching hats, which latter had been adjudged to be an infringement, in payment and discharge of the judgment for damages, and which agreement was consummated by such transfer:

Held, in an action brought five years thereafter in the name of the plaintiff corporation to set aside such transfer as fraudulent, and as *ultra vires*, that the transfer was valid and should be upheld, it not appearing that the plaintiff had at the time any other means of paying the judgment, and no offer being made, even now, to pay the same, and no readiness or ability to do so being alleged in the complaint. (*Id.*)

8. A principal on being informed of the act which his agent has assumed to do in his interest, is bound to affirm or disaffirm within a reasonable time. The doctrine of equitable estoppel applies to members of corporate or associate bodies, as well as to persons acting in a natural capacity. (*Id.*)

COSTS.

1. Where the plaintiff commenced an action against the defendant in a justice's court for a trespass on lands, and the same having been discontinued by a plea of title, the plaintiff brought the present action in this court for the same cause, and the like defense was interposed here. The plea of title was accompanied in each court by a general denial. At the trial at the circuit, the plaintiff gave no evidence tending to the trespass alleged in the complaint, and thereupon the court, on motion of the defendant, dismissed the complaint, no evidence whatever having been offered by the defendant:

Held, that the trial at the circuit was not the trial of an issue of fact, within the meaning of section 8285 of the Code of Civil Procedure, and the case is not within the exception made by this section, and the defendant and not the plaintiff is entitled to costs. (*Gates* agt. *Canfield*, *ante*, 81.)

2. When the general term reverses a judgment and orders a new trial with costs of the appeal to the appellant to abide the event, and the respondent, instead of submitting to a new trial, stipulates and appeals to the court of appeals, and is there successful:

Held, that he is entitled to costs. (*Murtha* agt. *Curley et al.*, *ante*, 222.)

8. Where a peremptory *mandamus* is denied without an alternative *mandamus*, the court has no authority to award costs except as upon a motion. (*The People ex*

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rel. Stillwell agt. New York Produce Exchange, ante, 523.)

4. Executors and administrators suing in their representative characters, *unnecessarily*, in cases where the cause of action (if any) accrues to them in their individual right, and failing to recover, are personally liable to the defendant for costs. (*Feig agt. Wray, ante, 391.*)

5. Where the record shows that the cause of action (if any) arose after the death of the testator or intestate, such right of action rests in the executor or administrator in his private right, and he cannot in such case escape the penalty of costs by suing in form in his representative capacity, *unnecessarily*, if he fails to obtain judgment. (*Id.*)

6. In such case the defendant may enter judgment against the plaintiff for costs without an order of the court permitting him to do so. (*Id.*)

7. Where, in an action in which costs are in the discretion of the court, a judgment is rendered in the supreme court, without any provision for costs, and on appeal to the court of appeals such judgment is affirmed, with costs, the only costs recoverable are the costs in the court of appeals. (*Newcomb agt. Hale, ante, 400.*)

8. The defendant H. had assigned a mortgage to the insurance company, with guaranty of payment. The plaintiff, as the receiver of the insurance company, commenced an action to foreclose the mortgage, making H. a party defendant. H. defended upon the ground that his guaranty of payment was discharged by the neglect of the company to foreclose, as he requested it to do. His defense was sustained at both circuit and general term, but overruled in the court of appeals, which

court "did order and adjudge that the judgment of the general term of the supreme court appealed from as relates to defendant H. be and the same is hereby reversed and modified by inserting a provision adjudging the defendant liable for any deficiency, and, as so modified, affirmed, with costs to the appellant."

Held, that as the judgment of the lower court is modified so as to render a judgment in favor of the plaintiff, but without costs, and as so modified is affirmed, with costs to the appellant, costs in the court of appeals only, and no other, are given.

First. The plaintiff was not entitled to recover costs in the supreme court as of course.

Second. The supreme court neither at special or general term has awarded them.

Third. The court of appeals has awarded costs only in that tribunal; and,

Fourth. As costs have never been allowed for the proceedings in this court, the allowance of them to the plaintiff by the clerk was erroneous. (*Id.*)

9. When plaintiff obtained on trial of an action a judgment against a defendant, who appealed to the general term which reversed the judgment of the court below, with costs of appeal to the defendant appellant to abide the event of a new trial. On appeal by plaintiff to the court of appeals the order of the general term was reversed and judgment of trial term was affirmed, with costs to plaintiff:

Held, that the plaintiff was not entitled to the costs of the general term. The words "with costs" in the order of the court of appeals means the costs in that court (*Reversing S. C., ante, 222.*) (*Murtha agt. Curley, ante, 465.*)

10. In an action brought by a creditor of a manufacturing corporation to compel the stockholders thereof to pay the debts of the company,

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a judgment was entered in favor of the plaintiff. It directed that he should recover the costs of the action; and that certain of the defendants should pay specific sums of money to the county treasurer; and that the latter should, from the amounts so paid into court, after paying his fees, pay the costs of the action as allowed and taxed, and divide the residue of the fund among the creditors:

Held, that the fees of the county treasurer for receiving and paying out the money could not be considered as a disbursement and be included and taxed as such in the plaintiff's bill of costs, but should be paid from and charged upon the general fund received by him. (*Veeder agt. Mudgett*, 27 Hun, 519.)

11. The judgment provided that each of the creditors whose claim was allowed by it should recover the costs of proving his claim:

Held, that the amount of the costs to be allowed to each creditor could only be determined by the court, and that it was error to tax them as motion fees at ten dollars to each. (*Id.*)

12. That the cost of printing copies of the referee's opinion and of the judgment could only be taxed by virtue of a written agreement signed by the attorneys for all the parties. (*Id.*)

13. In an action brought by the plaintiff in a justice's court to recover fifty dollars for work, labor and services performed for and rendered to the defendant, the latter set up a counter-claim of sixty dollars for goods sold and delivered. The plaintiff recovered a judgment for eight dollars damages and three dollars costs, from which the defendant appealed to the county court, where a new trial was had, and a verdict of "no cause of action" was rendered by the jury:

Held, that section 8070 of the

Code of Civil Procedure only applied to cases in which some judgment is recovered by the respondent, and that the defendant was entitled to the costs of the trial in the county court. (*Quick agt. Wison*, 27 Hun, 592.)

14. Where certain of the creditors of an insolvent life insurance company have been allowed to intervene in the proceedings instituted by the receiver, and to have notice of and liberty to oppose the same and move therein, the court should not grant to the counsel of such intervening creditors any allowances payable out of the fund in the hands of the receiver, whether such allowances be claimed under the provisions of the Code or whether they are claimed as reasonable counsel fees earned by them. Nor should the court charge the taxable costs of such intervening creditors upon the said fund. (*Attorney-General agt. Continental Life Ins. Co.*, 27 Hun, 195.)

15. Where the court refuses to direct the specific performance of a contract, but allows the action to be continued to enable the plaintiff to recover damages for a breach of the contract, it cannot require him to pay to the defendant the costs and disbursements incurred in the proceedings to compel a specific performance. (*Wheatpatrick agt. Dorland*, 27 Hun, 291.)

16. Where upon an appeal from a decree of a surrogate, denying a petition to compel the payment of legacies, on the ground that the claim is barred by the statute of limitations, the general term affirms the judgment, it may award costs at the same rates as are allowed upon an appeal from a judgment. (*Cole agt. Terpenning*, 27 Hun, 111.)

17. The costs of an appeal taken from a justice's court before, but heard and decided in the county

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court after, the Code of Civil Procedure took effect, must be allowed and taxed under section 3070 of the Code of Civil Procedure, and not under section 871 of the old Code.

Costs in the end will be granted or refused in accordance with the law existing when the party has the right to costs. (*Garling agt. Ladd*, 27 Hun, 112.)

18. Section 3371 of the Code of Civil Procedure authorizing the court, in its discretion, to require an executor or administrator to give security for costs, only applies to actions originally brought by or against an executor or administrator, and not to an action originally brought by the deceased, and simply revived in favor of his personal representatives. (*Sullivan agt. Remington & M. Co.*, 27 Hun, 270.)

19. Where, in an action brought in a county court, it is decided that although the court has jurisdiction over the parties, it has none over the subject of the action, the defendant may have the costs taxed in his favor. (*Thiem agt. Madden*, 27 Hun, 371.)

20. The plaintiff having recovered a judgment for nine dollars and eight cents in a justice's court, the defendant appealed therefrom to the county court, where a verdict was rendered in his favor; no offer was made by the plaintiff as provided for in section 3070 of the Code of Civil Procedure:

Held, that the defendant was entitled to have the costs taxed in his favor. (*Snyder agt. Hughes*, 27 Hun, 373.)

21. A proceeding to punish for a contempt of court is a criminal proceeding, and the general term, on reversal of an order of special term, adjudging a person in contempt has no authority to impose costs upon the relator. (*People ex rel. agt. Gilmore*, 88 N. Y., 626.)

COUNTY COURTS.

See APPEAL.

Matteson agt. Hall, ante, 515.

COURTS OF SESSIONS.

1. Under the provision of the Revised Statutes (2 R. S., 209, secs. 5, 6) authorizing courts of general sessions to send indictments to "the next court of oyer and terminer," it is not necessary to give the accused notice of application for an order of removal. (*Leighton agt. People*, 88 N. Y., 117.)

2. The said provisions are not limited or affected by the act of 1855 (*chap. 337, Laws of 1855*), in reference to the courts of sessions of the city of New York; and the court of general sessions in that city has the power of removal. (*Id.*)

CRIMINAL LAW.

1. Since the enactment of the Penal Code, police magistrates have the right to commit persons for disorderly conduct, in default of bail for good behavior. (*Matter of McMahon*, ante, 285.)

2. The power possessed by police justices under the former statutes to order persons convicted of disorderly conduct to find surety for their good behavior for a period not exceeding twelve months, and to stand committed for a period not exceeding twelve months, in default of giving surety, has not been affected by the Code of Criminal Procedure or by the Penal Code. (*Id.*)

CRIMINAL TRIAL.

1. Upon the trial of an indictment for the abduction of a young girl, the defense was insanity. The

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evidence tended to show that the purpose of this abduction was to take indecent liberties with the child; also, that the prisoner had previously committed other similar offenses. The prisoner's counsel requested the court to charge "that the test of criminal responsibility, when the defense of insanity is interposed to an indictment, is, whether the accused had sufficient reason to know right from wrong, and *whether or not he had sufficient power of control to govern his actions.* The court charged the first part of the proposition, also that a man must have sufficient control of his mental faculties to form a criminal intent before he can be held responsible for a criminal act, but declined to charge the part italicized:

Held, no error; that the charge went as far as the court could go on the subject of control, under the circumstances of the case. (*Walker agt. People*, 88 N. Y., 81.)

2. The court was also requested to charge that "where a person acts under the influence of mental disease he is not criminally accountable." This the court declined, but charged that "no act done by a person in a state of insanity can be punished as an offense:"

Held, no error. (*Id.*)

3. A third request to charge was that "the defendant in a criminal case is not required to prove his insanity in order to avail himself of that defense, but merely to create a reasonable doubt upon this point, whereupon the burden of proving his sanity falls upon the people." This request was refused, but the court, after charging in a manner not excepted to as to what constituted insanity, charged: "If you come to the conclusion, beyond all reasonable doubt, that he committed the crime * * * and that he was not insane, it will be your duty to convict. If there is any reasonable doubt arising upon the evidence

in the case, and upon nothing else, it will be your duty to give the prisoner the benefit of that doubt and acquit him:"

Held, no error; that the burden of establishing beyond a reasonable doubt, as one of the elements of guilt, that the prisoner was not insane, was, by the charge, cast upon the prosecution; that having charged the true rule, applicable to the whole case, the court was not bound to subdivide it and charge separately as to each of the elements necessary to constitute the crime. (*Id.*)

4. The court read from and adopted the language of an opinion in another case, that "to establish a defense of insanity it must be clearly proved:"

Held, that this, accompanied with and qualified by the instructions given, as quoted above, was not error; that taking the whole charge together it simply required substantial and clear evidence of insanity to justify an acquittal on that ground. (*Id.*)

5. Under the provision of the Revised Statutes (2 R. S., 209, *secs.* 5, 6) authorizing courts of general sessions to send indictments to "the next court of oyer and terminer," it is not necessary to give the accused notice of application for an order of removal. (*Leighton agt. People*, 88 N. Y., 117.)

6. The fact that the record does not show that the indictment was sent to the next oyer and terminer is no ground for the reversal of a judgment of conviction. If there was error in that respect, it should be shown, it cannot be inferred. (*Id.*)

7. The said provisions are not limited or affected by the act of 1855 (*chap.* 337, *Laws* of 1855), in reference to the courts of sessions of the city of New York; and the court of general sessions in that city has the power of removal. (*Id.*)

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8. Upon the trial of a criminal action it is in the discretion of the court, after the defense has rested, to allow the prosecution to give evidence in aid of the case already made, and which would have been competent if offered in the first instance; and this, although the evidence is in contradiction of matter sworn to by the prisoner. (*Id.*)
9. On the trial of an indictment under the statute (2 R. S., 664, sec. 25) for the offense of taking a "woman unlawfully, against her will, with the intent to compel her by force, menace or duress * * * to be defiled," the evidence tended to show that the prosecutrix, a German girl about sixteen years of age, who had been in this country about three weeks, went to a house of prostitution kept by the prisoner, not knowing the character of the house, for the purpose of obtaining employment as a domestic; that the prisoner detained her there by exciting her fears that if she left she would be arrested, and by keeping the outer door locked; that the prisoner plied her daily with solicitations to consent to the defilement of her person, but she refused; that finally the prisoner told her to go up stairs with a man, and upon her refusal, opened the door of the room where she was and shoved her into the hall, whereupon she went up stairs to her room, and in a half hour after a man called the "boss" came to her room with another man and left him there, and this man by force defiled her:
Held, that the evidence was sufficient to sustain a conviction. (*Schnicker* agt. *People*, 88 N. Y., 193.)
10. Also, *held*, that the evidence as to what occurred in the room of the prosecutrix was properly received; that the occurrence was part of the *res gestae*, and might reasonably be inferred to have been in pursuance of the scheme of the prisoner to subject the prosecutrix to defilement; also, that the prosecutrix was properly allowed to state the reason of her going to the house of the prisoner. (*Id.*)
11. Upon the trial of an indictment for murder in the first degree, where the homicide is proved and the evidence discloses no circumstances indicating that it was committed under the influence of provocation at the time, or sudden anger, but it appears the act was done with premeditation, and deliberation, evidence that the prisoner had an irascible temper, or was subject to fits of passion from slight causes, is incompetent. (*Sindram* agt. *People*, 88 N. Y., 196.)
12. So also evidence is incompetent that the conduct of the prisoner for a period prior to the homicide was characterized by eccentricities and peculiarities causing criticism with reference to his mental capacity, where the evidence is not offered for the purpose of proving insanity, but solely as bearing upon the question of intent, deliberation and premeditation. (*Id.*)
13. Upon the trial of such an indictment, the evidence was unquestioned as to the killing, the court in its charge stated: "There is no doubt about the assassination, that the deceased person was killed." The prisoner's counsel excepted to the expression "there is no doubt about the assassination." The court explained that what was meant was there was no doubt about the killing:
Held, no error. (*Id.*)
14. Evidence was given as to a declaration of the prisoner before the homicide. The court stated in its charge that "the testimony seems to be overwhelming in favor of his having uttered it." On attention being called to this expres-

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sion, the judge stated that he changed the phraseology; that he thought the testimony was preponderating, but he was only expressing his opinion, and he left all the questions of fact to the jury:

Held, that there was no error authorizing a reversal. (*Id.*)

15. Certain letters of the prisoner, written after the homicide, were put in evidence. In commenting upon them in the charge the court said: "They exhibit a reckless depravity of nature, destitute of remorse or regret, the reckless spirit of a desperado." The letters fully warranted these comments; on exception being taken the court directed the jury to disregard what had been said about the letters, and to form their own conclusions;

Held, no error. (*Id.*)

16. The court also stated that the letters indicated a high order of intelligence. This was also modified by withdrawing the words "a high order of:"

Held, no error. (*Id.*)

17. The comments of the trial court in its charge upon the testimony are not ordinarily the subject of legal exception so long as the questions of fact are left with the jury with instructions that they are the sole judges thereof. (*Id.*)

18. As to whether such comments may not be carried so far as to afford ground for assigning error, *quare*. (*Id.*)

19. As a general rule the interference of the court with counsel, when opening a case to a jury, is a matter of discretion, the exercise of which is not the subject of exception. (*Walsh* agt. *People*, 88 *N. Y.*, 458.)

20. Upon the trial of an indictment for murder, the district attorney, while opening the case, handed to

the jury a photograph which he stated was a likeness of the deceased, a young girl; the prisoner's counsel thereupon objected; the court replied, in substance, that the objectionable act had been done and could not be recalled:

Held, that an exception was untenable. (*Id.*)

21. The error book was supplemented by an affidavit of the prisoner's counsel to the effect that while the colloquy was going on between the counsel and the court, the photograph was examined by jurors who had not before done so:

Held, that although the court might have interfered and prevented such examination, its omission to do so when attention was called to the subject did not constitute legal error. (*Id.*)

22. It appeared that the prisoner, on the morning of the homicide, procured the knife to be sharpened with which it was done; that he also asked a fellow workman where the heart was located. Evidence was then offered and received under objection and exception to the effect that on the same morning he asked another workman if pepper thrown in the eyes would blind a person, and what would be done with him if such a thing should happen, and that he was informed he would be sent to State prison:

Held, no error; as with the other circumstances, it authorized an inference that the prisoner was then meditating a personal injury to the deceased. (*Id.*)

23. The defense was insanity. After proof had been given that the prisoner's father had epileptic fits, but before any evidence as to the insanity of the prisoner, or any member of his family, or tending to show that epilepsy is a disease which affects the mind, a witness for the defense was asked if he had noticed at any time anything

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strange in the conduct of a brother of the prisoner; this having been objected to by the prosecuting attorney, the court stated that it was proper for the defense to show that the father was afflicted with any disease of the mind, and afterward to prove such a disease hereditary; said attorney then stated he would concede that other members of the family have shown strange and unusual conduct. The question was then repeated, was objected to and excluded:

Held, no error. (*Id.*)

24. *It seems*, that in such a case it is competent, in aid of other proof tending to justify an inference of insanity at the time of the commission of the act to show that the prisoner inherited a disease which predisposed him to insanity, and also to show insanity of parents or relatives. The order of proof, however, is in the discretion of the court. (*Id.*)

25. Upon the trial of an indictment for wrongfully attempting to obtain public moneys from the county of A. by means of a fraudulent undertaker's bill, it appeared that among the items in the account presented by the prisoner was one for the burial and taking care of the body of K. The prosecution proved by one C. that he made a contract with the prisoner to pay twenty-four dollars for the entire expenses of the burial, which sum was paid by C.; the latter also testified that prior to making such contract, he had made a contract with A. to perform the same services, but, at the request of the widow of the deceased, had employed the prisoner. The prisoner testified that his agreement with C. was simply for the coffin. A. was called as a witness for the prosecution, and on being recalled by the defense was asked: "Do you remember the price of the coffin you were to furnish?" This was objected to as irrelevant and immaterial, and excluded:

Held, no error. (*People* agt. *Bragle*, 88 N. Y., 585.)

26. During the trial the prisoner wishing to communicate with a witness by telephone, which was in an ante-room connecting with the court-room by swinging doors and within call, started to go to it for that purpose; the district attorney objected, but the prisoner went, and was absent about five minutes, during which time his counsel continued the cross-examination of a witness:

Held, that this was not a violation of the statutory provision (3 R. S., 731, sec. 13) declaring that no person can be tried for a felony "unless he be personally present during such trial;" that said provision was intended for the protection of the prisoner and a substantial performance was all that was required. (*Id.*)

27. The court charged that the offense was a misdemeanor; no exception was then taken, but after verdict, a motion to set it aside on the ground of error in this charge was made, which was denied, and after this an exception to the charge was taken:

Held, untenable; that assuming the strict rule as to taking exception should not be enforced on a criminal trial, no injury could have resulted from the alleged error. (*Id.*)

DAMAGES.

1. Counsel fees, incurred by defendant for services in an action other than those made necessary by a temporary injunction therein, cannot be assessed as damages upon the undertaking given on granting the injunction. (*Randall* agt. *Carpenter*, 88 N. Y., 203.)
2. So, also, fees for services of counsel in unsuccessfully resisting the allowance of the injunction are

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not allowable as damages by reason of the injunction. (*Id.*)

DEED.

1. The defendant, after having accepted a deed of certain premises with an assumption clause that the conveyance was subject to "all liens and incumbrances of record on the said premises," is estopped from contesting the validity of a mortgage upon the premises at that time upon record, and is liable for any deficiency that may arise upon the sale of the mortgaged premises upon foreclosure of said mortgage. (*Styles* agt. *Price*, ante, 227.)

DEED OF SETTLEMENT.

1. Edgar H. Laing, by a deed of settlement executed in 1846, settled the rents and profits of certain property upon his wife Sophia for life, and, upon her decease, "then upon trust to convey and transfer said premises to such person or persons and in such manner as the said Sophia, by her last will and testament, * * * which she is hereby authorized to make and execute, may direct, limit or appoint." She, in 1870, executed her last will, reciting, among other things, that her mother had recovered a judgment against her for \$25,000, and referring to a contract entered into by her, "in and by which I also bind myself to pay and discharge the said judgment of my mother. * * * Now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of my principal as may be found necessary to carry out said agreement." She gives her residuary estate to her executors in trust, after paying all debts:

Held, that the mother of the

testatrix, referred to above, is entitled to have the estate and property embraced within the deed of settlement, and referred to in the will, applied by the executor and trustee under the will to the payment and satisfaction of the judgment. (*Kinnan* agt. *Guernsey*, ante, 253.)

DEFENSE.

See CONTRACT.

Alexander agt. *Shillaber*, ante, 580.

DISTRICT COURTS.

1. The district courts of the city of New York have power to grant orders of interpleader, and such power is not taken away or affected by the Code of Civil Procedure. (*Beer* agt. *Benner*, ante, 235.)
2. Though under the district court acts there could be no execution against the person in an action in the district courts, unless the action had been commenced by warrants; since the enactment of the Code of Civil Procedure, which requires all actions to be begun by the service of summons, the right to a judgment making defendant liable to execution against his person depends upon the nature of the action, and not upon the manner of commencing it. (*Searing* agt. *Goodstein*, ante, 427.)

DIVORCE.

1. Where a decree of divorce is granted upon the application of the husband for the reason of the adultery of his wife, she ceases, whether or not the decree awards the custody of the children to the father, to have any right to the care, control, education or companionship of the minor children;

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and the court has no jurisdiction after final judgment to enjoin upon the husband or the children the company of the woman who has violated her marriage vows. (*Crimmins* agt. *Crimmins*, ante, 108.)

DOWER.

1. Where a specific provision by the testator in his will, for his wife, inconsistent with a right in the widow to demand a third of the land to be set off to her, she must make her election, though the testator does not in terms declare that such provision is to be taken by her in lieu of dower. (*Young et al.* agt. *Boyd*, ante, 218.)
2. Where the testator by his will clothed his executors with a power of sale of all his estate, real and personal, in such form as to work an equitable conversion of the realty into personalty, and vest them with the title to all the property, the income of a portion of the proceeds of the estate when sold to be paid to the widow for life, the remainder of the proceeds being absolutely disposed of, the widow cannot take both dower and the provision made for her by the will, the claim of the one being inconsistent with and repugnant to the other. (*Id.*)

EASEMENT.

1. The rule is, that where a conveyance is bounded upon a street or highway in the absence of any expression, showing a contrary intent, the grantor will be deemed to have intended to convey the fee to the center line of the street or highway. If, however, it is bounded by the easterly or westerly or the exterior bounds, or commences and runs from some fixed monuments so as necessarily to cause the line to run on the

exterior line of the street or highway, so that it is apparent that it was the intention of the grantor to reserve to himself the fee of the highway, there the deed must be construed accordingly. It is a question of intent to be determined from the reading of the instrument. (*Foster* agt. *City of Buffalo*, ante, 127.)

2. Another rule is, that where the owner of land in a city lays out a street through, or a park in it and then sells off lots on either side, bounded thereon, the purchasers are entitled to have the space of ground laid out left open forever for their use and enjoyment. (*Id.*)
3. Where, as in this case, the Holland Land Company (who formerly was the owner of most of the land now embraced in the city of Buffalo); in the year 1814 laid out this open space and named it Cazenovia terrace, and it ever since has been kept open and used as a public street and park, the plaintiffs and their grantors in making their purchases understood that the same was so laid out and dedicated for that purpose: *Held*, that even if it be conceded that the plaintiffs who are the present owners of some portion of the land abutting on said terrace, are not the owners of the fee of the lands embraced within the terrace, are the owners of an easement therein, of which they cannot be deprived except by a voluntary conveyance, or by the taking of the same under the rights of eminent domain. (*Id.*)

4. The city is not the owner of the fee of the lands embraced within the terrace and on which it proposes to erect the building; and until it acquires the fee, or extinguishes the easement, it has no right to take and occupy the same for any other purpose than that for which the lands were originally dedicated. (*Id.*)

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EJECTMENT.

1. An action of ejectment may be maintained by the owner of lands against a telegraph company for the removal of poles which have been set by such company on the side of the road in front of the plaintiff's lands and residence without first having made compensation. (*Dusenbury* agt. *Mutual Union Telegraph Company*, ante, 206.)
2. Under the act of 1853 (*Laws of 1853, chap. 471*) amending the act of 1848, providing for the incorporation and regulation of telegraph companies, such companies cannot enter upon and use lands (which includes public roads, streets and highways) without first compensating the owner or owners thereof. It must make payment precede appropriation. (*Id.*)

See PLEADING.

The Mayor, &c., agt. *Smith*, ante, 89.

ELECTION LAW.

1. Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there. (*Matter of Collins*, ante, 63.)
2. A person living with his wife during the period required by the constitution, on board of his lighter, alongside pier five, in the East river, when not called away by business, acquires thereby such a connection between himself and the said pier, as to become a resident of the election district, in which the said pier is situated, within the meaning of the constitution, and the election and registra-

try laws, and upon giving proof of these facts, before the proper officers, is entitled to have his name enrolled as a qualified voter of said district. (*Id.*)

3. The statutes of the state require the inspectors of election in their return to make a true statement of the result of the election held in their district, and until they have so done, their duty under the law remains undischarged. (*The People ex rel. Sanderson* agt. *Board of County Canvassers of Greene Co.*, ante, 201.)
4. If what purports to be a return has been made, which either by mistake or design is inaccurate and erroneous, they have not by making such erroneous statement and return discharged their duty under the law, and therefore as their duty is undischarged, they have not become *functus officio*. (*Id.*)
5. Only when they have complied with the statute, by making an accurate and true return of the votes cast for a particular office and the votes cast for each candidate for the office, has their duty under the law been discharged. (*Id.*)
6. Although a court should be careful not to needlessly cause a return to be sent back to the inspectors of an election district for correction, yet it should do so, whenever the facts and circumstances proved to the satisfaction of the tribunal show that a mistake has in fact been made. (*Id.*)
7. Prior to the passage of the act of the legislature of 1880 (*chap. 460*), the court had not the power to compel a board of county canvassers to reconvene and reconsider their work. By that act, however, whenever it appears by affidavit that error has occurred, the court can reconvene them, and by writ of *mandamus* compel them to correct the error. (*The People*

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ex rel. Deuchler agt. Board of Canvassers of Wayne Co., ante, 334.)

8. The power of the board of canvassers, which is derived only from the statute, which says: "The original statement of the canvass in each district shall then be produced, and from them the board shall proceed to estimate the votes of the county, and shall make such statement thereof as the nature of the election shall require; such statements shall then be delivered to, and deposited with, the county clerk;" imposes upon them purely ministerial duties, and cannot be extended by them beyond a mere count of what appear on their face to be the original returns, and which are apparently regular. (*Id.*)

9. Nothing is committed to the judgment or discretion of the board. Their duty is arithmetical merely. They are to cast up the votes appearing upon the returns of the district inspectors, which are produced before them. They are not authorized to institute any inquiries as to the authenticity of the returns, but are to take those produced before them, if they are regular on their face, and if they are not regular on their face, they must return them to the inspectors for correction. (*Id.*)

10. Where it appeared that at the last general election in this state 629 electors residing in the third election district of the town of Lyons, voted for the various candidates and measures there offered to the people for their suffrages, the board of county canvassers, when in session for the purpose of estimating and determining the number of votes which had been cast in the county, by a bare majority vote, wholly rejected the returns made by the inspectors of the election district, and consequently these 629 voters were not recorded for or against any such measures or candidates:

Held, that a peremptory writ of *mandamus* should be issued requiring the board of county canvassers of Wayne county to reconvene and to receive the original statements or returns of the third election district of the town of Lyons, and to estimate, determine, certify and publish the votes therein contained, and to correct their former determination thereon.

Held, further, that although in the operation of the election laws, there may be some essentials entering into the methods of taking and returning the votes by which the inspectors of election, who are in some sort the agents of the electors at large, may violate the statutes to the extent of working in a given case a practical rejection of honest votes, yet it is not the province of the board of county canvassers to adjudge it. They discharge their whole power and duty when, as accurate accountants, they return to the state canvassers the results of the apparently and ostensibly fair figures which may be presented to them. (*Id.*)

11. When a return from an election district which had been made to the board of county canvassers has, by order of the court, been sent back to the district inspectors for correction, on motion for a *mandamus*, directed to the district inspectors, commanding them to reassemble and make a full and true return to the board of county canvassers of all the votes cast for each candidate for a certain office, and the affidavits showed that the error, if any, was made by incorrectly adding the votes counted by each inspector:

Held, first, that the right to have such a return made does not depend upon the present allegations of the inspectors, but upon the fact that their own statements and affidavits in regard to the result in their district has been so conflicting and confusing that the

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parties interested, and the people, are entitled to have them reassemble, and, after deliberation and consultation, certify under their hands, in a formal and official manner, a true statement of the result at their poll. The public are entitled to such a statement in an official form to have all doubts solved, and to hold such officers responsible if they certify falsely.

Second. The writ is necessary so that the individuals comprising the board of inspectors may meet for consultation, and then give the result of such consultation.

Third. An affidavit of two of the inspectors that the returns as made to the board of county canvassers is "substantially" accurate, and that if they meet as a board of inspectors they cannot change the same in any "material" particular, is not sufficient. They are not to judge whether or not the correction, if made, will be "material."

Fourth. The people are entitled to have a detailed statement of the result at their poll. What they shall return, the court does not direct, but it demands and must have from them a written statement, full, clear and explicit, of what they are willing to declare, over their official signatures and upon their official oaths, is true in regard to the votes cast for each candidate for the particular office.

Held, further, that as confusion and error appears from their own affidavits to have occurred in the gross result by the addition of the separate counts of ballots by each inspector, that they should be required to separately return the votes counted by each inspector. (*Sanderson agt. Payne, ante, 857.*)

ment or money to procure or compensate voters, or to contribute money for any other purpose intended to promote an election of any particular person or ticket (1 *R. S. [6th ed.]*, 452, sec. 6), except for defraying the expenses of printing and the circulation of votes, hand-bills and other papers previous to any such election, or for conveying sick poor or infirm electors to the polls. (*Murphy agt. English, ante, 362.*)

13. In an action to recover compensation for making certain speeches in the state of Indiana, under an alleged employment by defendant, the defendant set up as a defense in his answer that "the alleged contract was and is against the policy of the common law, repugnant to the constitution and laws of the United States, against public policy, and void. On demurrer to this defense:

Held, that no authority had been found to show that it is an offense at common law for a candidate for a national office, who could not personally present his individual views of national policy over a wide area of constituency, to employ and compensate a person for that purpose:

Held, further, that the pleadings not showing when the alleged contract was made, but all agreeing that it was to be fully performed in the state of Indiana, and there being no averment in the answer that the alleged contract is void by the law of that state, that fact cannot be assumed, and the penal statutes of this state have no extra territorial jurisdiction. (*Id.*)

ERROR (WRIT OF).

12. By statute of this state, imposing penalties for violation of election laws, it is a misdemeanor for any candidate for an elective office, with intent to promote his election, or for any other person in his behalf, to furnish entertain-

1. The right of review by an appellate court in a criminal action is limited to exceptions taken on the trial to decisions of the court, and to errors appearing upon the face of the record. (*Walsh agt. People, 88 N. Y., 458.*)

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2. *It seems*, that where justice has been perverted by practice *dahors* the record, or the accused has been injured by any circumstance occurring on the trial, not the subject of legal exception, the legal remedy of the party aggrieved is by a motion for a new trial. (*Id.*)

ESCAPE.

1. In an action against a sheriff for an escape of one held in custody under an execution, where that officer justifies under an order of the county judge discharging the prisoner, if it appears that the judge had jurisdiction over the subject-matter and the person of the debtor, and that the statutory requirements in regard to such an application were substantially complied with, the discharge is valid and the defense is established. (*Goodwin* agt. *Griffe*, 88 N. Y., 629.)
2. If the order itself recites the necessary jurisdictional facts, it is sufficient; if it omits any essential fact, the sheriff may show its existence by proof *abunde*. (*Id.*)
3. In such an action the sheriff may set up as a defense that the execution under which the judgment debtor was imprisoned was illegally issued, and that the arrest was unauthorized and void. (*Id.*)
4. *It seems*, that where the process is erroneous, and so voidable simply and not void, the sheriff cannot set up the defects. (*Id.*)

ESTOPPEL.

See TOWN BONDS.
Calhoun agt. *Delhi and Middletown Railroad Company*, ante, 291.

See CORPORATIONS.
Sheldon Hat Blocking Co. agt. *Eickemeyer Hat Blocking Machine Co.*, ante, 467.

1. A husband who has voluntarily permitted his insane wife to absent herself from his house and to become a public charge is liable to an action at the suit of the proper town or county officers for her support, and is estopped from denying in such action that she is a pauper. (*Goodale* agt. *Lawrence*, 89 N. Y., 513.)

EVIDENCE.

1. It is an indispensable preliminary to the introduction of a memorandum in evidence, that it should appear that the witness is unable, without the aid of the memoranda, to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness that the writing is admissible. (*Collins* agt. *Rockwood*, ante, 57.)
2. It is the duty of the court in all such cases, to see before receiving a memorandum in evidence that it was made at or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witnesses, and that there is necessity for its introduction on account of the inability of the witness to recollect the facts. (*Id.*)
3. Where a witness has a distinct recollection of all the facts, independent of the memorandum, the latter should not be admitted in evidence. (*Id.*)
4. Where, in a trial involving the issue as to whether or not the defendant sustains the relation of trustee to plaintiff, and in respect of property described in the complaint, a witness on the stand testifies that he received a letter from defendant in reference to the property, "but the court have no means of knowing either the contents of the letter or the answer which was expected from the witness; but assuming that the an-

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swer would have been pertinent to the issue, it was for the court to determine, in the first instance, whether the evidence established that the letter was destroyed, and also that its destruction was not to produce a wrong or injury to the opposite party, or to create an excuse for its non-production." (*Mason agt. Libby, ante, 259.*)

See WARRANTY.

Raines agt. Totman, ante, 498.

5. The statute of 1880, chapter 36, permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine. This proof of genuineness is addressed to the court in distinction from the jury, and error cannot be alleged in respect thereto. (*Hall agt. Van Franken, ante, 407.*)

6. Where in an action on a promissory note a deed acknowledged by the defendant was offered for the purpose of comparing the signature, the defendant being present at the trial and making no offer to disprove the genuineness of the signature to the deed:

Held, that there was no error in the admission of the deed for comparison only. There was not an absence of all evidence as to the genuineness of the signature to the deed, and therefore there was no error in this respect. (*Id.*)

7. Identity of name coupled with the fact that the defendant made no offer to disprove the assertion that he was the signer of the deed, was enough to authorize the court to hold the signature of the deed to be the defendants. (*Id.*)

8. One Willett was arrested upon the charge of murder and taken to the district attorney's office, where he had a conversation with Hotchkiss, a detective. Willett made a statement voluntarily and with knowledge that Hotchkiss was a detective. Thereafter at a second

and third interview the prisoner made similar and further statements, those of the third interview being reduced to writing and signed by him. On the second and third occasions he was told by the district attorney that he need not make the statements unless he was willing to do so; that if he was innocent he did not see that it would do him any harm; that if he was guilty it would probably be used against him and that it might hang him:

Held, that the statements were voluntarily made and were properly admitted in evidence upon his trial.

That where there is no conflict in the evidence as to the circumstances under which such statements were made, the admissibility of such statements should be decided by the court and not be left to the jury.

Seemle, that the rule is the same even when the evidence is conflicting. (*Willett agt. People, 27 Hun, 469.*)

9. Upon Willett's arrest letters were found in his trunk from the deceased and also from the sister and the daughter of the deceased, which tended to show that the writers of them knew that improper relations had existed between Willett and the daughter. No letters from Willett in answer to, or calling forth the said letters were produced or proved to have been written:

Held, that the court erred in allowing the letters to be received in evidence against the prisoner.

It seems, that the letters might have been received for the sole purpose of showing that Willett had notice of the statements therein contained, as bearing upon the question of motive, but that they could not be admitted as evidence of the truth of the facts stated. (*Id.*)

10. A witness, upon being examined before the coroner's jury, testified

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that, on the night of and shortly after the murder, a stranger called at her house and asked the way to Sandy Hill, and also for a glass of water. In order to test the memory and correctness of the witness, the prisoner and a number of strangers were placed around a room, and the witness upon being asked to pick out the individual she saw at her house that night, designated the prisoner. She was then seated, and a number of persons passed behind her in such manner that she could not see them, each one repeating the question as to the road to Sandy Hill and asking for a drink of water. The witness again recognized the prisoner by his voice. In neither instance did he deny that he was the person she saw that night. Upon the trial these experiments were admitted in evidence upon the theory that from the prisoner's silence at that time the jury might infer the truth of the witness' statement that he called at her house that night:

Held, that the prisoner was under no obligation to deny the truth of the statement made by the witness before the coroner's jury, and that the court erred in admitting the evidence. (*Id.*)

11. A party may always show that the opposite party has offered a witness a bribe to induce him to swear falsely. (*Gulerette* agt. *McKinley*, 27 *Hun*, 320.)

12. Upon the trial of an action brought to recover damages for an assault with intent to ravish, the defendant called a witness who testified that according to the speech of people the reputation of the plaintiff was not good. Being asked upon cross-examination what persons he had heard speak about the plaintiff, he named her father as one. Upon his re-direct-examination the court, upon the plaintiff's objecting, refused to allow the defendant's counsel to

ask the witness what he had heard the plaintiff's father say:

Held, no error. (*Id.*)

13. Another impeaching witness called by the defendant testified, on his cross-examination, that he had heard certain stories about the plaintiff:

Held, that the court properly refused to allow the defendant's counsel to ask what those stories were. (*Id.*)

14. In an action by a female for an indecent assault, the injury to her feelings being an element of damages for which she is entitled to compensation, specific acts of lewdness on her part with men other than the defendant may be shown in mitigation of damages although not pleaded. (*Id.*)

15. *It seems*, that such lewd acts may be shown, though they occurred after the assault, if they followed it so closely in point of time, as that they might properly be considered by the jury in determining the state of the plaintiff's "moral sensibilities" at the time of the assault and the extent to which they were likely to be injured by it. (*Id.*)

16. In action to recover damages resulting from a collision in New York harbor, it appeared that an investigation as to the circumstances of the collision was had by the supervising inspectors. The record of the evidence taken was offered in evidence on the trial on behalf of defendant, and an offer was made to show otherwise what occurred upon that trial. This was rejected:

Held, no error. (*Erwin* agt. *N. Sw't Co.*, 88 *N. Y.*, 184.)

17. Upon the trial of an indictment for murder in the first degree, where the homicide is proved and the evidence discloses no circumstances indicating that it was committed under the influence of

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- provocation at the time, or sudden anger, but it appears the act was done with premeditation, and deliberation, evidence that the prisoner had an irascible temper, or was subject to fits of passion from slight causes, is incompetent. (*Sindram* agt. *People*, 88 N. Y., 196.)
18. So, also, evidence is incompetent that the conduct of the prisoner for a period prior to the homicide was characterized by eccentricities and peculiarities causing criticism with reference to his mental capacity, where the evidence is not offered for the purpose of proving insanity, but solely as bearing upon the question of intent, deliberation and premeditation. (*Id.*)
19. A father holding a bond and mortgage executed by his son, with the intention of giving to the latter a portion of the mortgage debt and without any undue influence, fraud or duress, executed and delivered to him a receipt therefor, containing a provision that the sum stated should be indorsed on the mortgage. In an action by the son, after the death of the father, against the executors to compel a cancellation of the mortgage, S., who was not a party to the action but was a special and residuary legatee, was called as a witness for plaintiff to prove the declarations of the deceased. This evidence was objected to; objection overruled:
Held, no error; that it was not within the prohibition of the Code of Civil Procedure (sec. 829), as the witness was not testifying in her "own behalf or interest;" as specific legatee she was totally unaffected, and as residuary legatee, her interest was against the validity of the gift which her evidence tended to establish. (*Carpenter* agt. *Soule*, 88 N. Y., 251.)
20. In an action originally commenced against two members of a firm upon a firm indebtedness, the defendants gave an undertaking to discharge an attachment, and thereafter a plea in abatement having been interposed, the attorney for the original parties stipulated for the amendment of the summons and complaint, so as to bring in, as defendant, another, a partner in the firm. The summons was amended without the order of the court, or the consent of the sureties in the undertaking, by inserting the name of the third defendant who voluntarily appeared in the action, and judgment was recovered against all three of the defendants. Upon the trial of an action upon the undertaking, the court allowed a certified copy of the attachment to be given in evidence under an objection that it had not been shown that the attachment had been granted:
Held, that the evidence was immaterial, as the undertaking recited the issuing of an attachment, and that was sufficient proof of the fact, (*Christal* agt. *Kelly*, 88 N. Y., 225.)
21. Defendant excepted to the reading in evidence of the original summons and complaint which were attached to the judgment-roll, on the ground that they formed no part of the record:
Held, untenable; that they were admissible to show the identity of the action with that described in the undertaking, and assuming they were not properly a part of the record, their admission in connection with it was not error. (*Id.*)
22. In proceedings before a surrogate, instituted by plaintiff as administrator of the estate of a deceased wife, defendant, who was at the time administrator of the estate of the husband, was examined as to his possession of any articles belonging to the estate of the wife. On that examination he swore that he had a carriage

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and clock belonging to said estate. In this action brought to recover property alleged to belong to said estate including the carriage and clock, defendant's testimony was offered in evidence; it was objected to on the ground that defendant being administrator of the husband's estate could not bind that estate by his admissions:

Held, untenable; 1st, because he was sued as an individual and no claim was made against him as administrator or against the estate he represented; 2d, if, because he was administrator the proceeding for his examination must be treated as one against the estate he represented, his admission was made while in the performance of an act relating to the estate, and was competent as part of the *res gesta*. (*Whiton agt. Snyder*, 88 N. Y., 209.)

23. After the clock had been described by witnesses, a witness who dealt in such articles, but who had never seen the clock in question, was asked a hypothetical question as to its value, it being described in the question as testified to by the other witnesses; this was objected to and objection overruled.

Held, no error. (*Id.*)

24. Upon a reference under the statute of an account against an estate for horseshoeing, the claimant, to prove his account, offered his ledger, which was received in evidence. It appeared that the items of work done were first entered at the time upon a slate, generally by claimant, who superintended the work and attended in part to the shoeing himself, and made the entries save when occasionally absent. These entries were correctly transferred by his book-keeper nearly every day to a day-book, and from thence to the ledger. No prices were entered until the charges were carried to the ledger, then the claimant fixed the prices; general evi-

dence was also given that the work was done by the claimant and his workmen. The ledger showed a credit for moneys paid by defendant's testator. There was no contradictory evidence as to the correctness of the amount or as to the work done. Aside from the book-keeper who transferred the accounts, the claimant kept no clerk. Several witnesses also testified that they had settled their accounts with the claimant and found them honest and correct, but they had never seen the books: they settled from bills which were proved to have been correctly copied from the books. The claimant's book-keeper also testified that he settled his own accounts by the books, and to the best of his knowledge the claimant kept honest books:

Held, that the ledger could be regarded as a book of original entries, and was properly received in evidence; and that the book-keeper was a competent witness to prove the correctness of the books. (*In re McGoldrick agt. Traphagen*, 86 N. Y., 331.)

25. The rule excluding books of account kept by a party who keeps a clerk applies only where there is an employe who has something to do with and has knowledge generally of the business of his employer as to goods sold or work done, so that he can testify on the subject; one whose business is simply to keep the books is not a clerk within its meaning. (*Id.*)

26. Diaries kept and letters written by a testator either before or after the execution of the will, while proper evidence as bearing upon the mental capacity, and the condition of the mind of the testator with reference to objects of his bounty, are not competent evidence of the facts stated in them or to prove fraud or undue influence. (*Marr v. McGlynn*, 88 N. Y., 357.)

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27. In an action to recover for the alleged wrongful conversion of property which plaintiff had purchased of B., defendant justified as sheriff under attachments against B., and claimed that the transfer to plaintiff was fraudulent as against B.'s creditors. On the trial plaintiff, as a witness in his own behalf, was asked and permitted to answer, under objection and exception, whether he purchased with any intent to aid B. "to hinder, delay or defraud his creditors."

Held, no error. (*Starin* agt. *Kelly*, 88 N. Y., 418.)

28. A witness called for the defense was asked to state conversations which occurred at the time of the levy between himself, L., a clerk of plaintiff, who was in charge of the property, and K., the deputy sheriff, who made the levy, in regard to the goods; neither the plaintiff nor B. was present; this was objected to and excluded:

Held, no error. (*Id.*)

29. It appeared that after the levy plaintiff called two persons, who died before the trial, to make an inventory and appraisal of the articles seized. Plaintiff, as a witness, was permitted, under objection and exception, to take this inventory and state the amount at which the goods were appraised; the inventory and appraisal were subsequently proved by one of the persons who made them, and were received in evidence. The deputy who sold the property under the attachment stated, as a witness, the gross amount realized from the sale; and the verdict was for this precise amount:

Held, that such use of the inventory was not error authorizing a reversal. (*Id.*)

30. Where, in an action brought by an administratrix, S., a witness for the plaintiff, had testified to conversations in his presence at a

place specified between plaintiff's intestate and O., one of the defendants:

Held, that it was competent for O. to testify that plaintiff's witness was never present at the place specified when any conversation or transaction occurred between him and the deceased, and that the interviews between them did not occur at the place named by the witness; but that he was not competent to testify as to anything that was or was not said or done between them. (*Pinney* agt. *Orth*, 88 N. Y., 447.)

31. This action was to recover for services alleged to have been rendered by plaintiff's intestate as attorney and counsel. The witness S. testified to conversations and transactions between the deceased and defendant O., in reference to a certain suit. It was claimed by plaintiff's counsel that if the referee erred in excluding the testimony of O., it was immaterial, because the referee disallowed the claim for services in that suit:

Held, that as S. also testified as to other claims which were allowed, and the allowance depended largely upon the credit to be given to his testimony, defendants were entitled to the benefit of any contradiction in respect to said suit, which would have tended to impeach his credit or accuracy. (*Id.*)

32. Certain questions were asked O. in regard to the services of the deceased in another suit as to which S. testified; the exclusion of these questions was held error by the general term, but it affirmed the judgment on condition that plaintiff should deduct from the recovery the amount allowed for services in that suit:

Held, error; as it deprived defendants of any advantage from a material contradiction of plaintiff's witness. (*Id.*)

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83. Upon the trial of an indictment for murder it appeared that the prisoner, on the morning of the homicide, procured the knife to be sharpened with which it was done; that he also asked a fellow-workman where the heart was located. Evidence was then offered and received under objection and exception to the effect that on the same morning he asked another workman if pepper thrown in the eyes would blind a person, and what would be done with him if such a thing should happen, and that he was informed he would be sent to State prison:

Held, no error; as, with the other circumstances, it authorized an inference that the prisoner was then meditating a personal injury to the deceased. (*Walsh* agt. *People*, 88 N. Y., 458.)

84. The defense was insanity. After proof had been given that the prisoner's father had epileptic fits, but before any evidence as to the insanity of the prisoner or any member of his family, or tending to show that epilepsy is a disease which affects the mind, a witness for the defense was asked if he had noticed at any time anything strange in the conduct of a brother of the prisoner; this having been objected to by the prosecuting attorney, the court stated that it was proper for the defense to show that the father was afflicted with any disease of the mind, and afterward to prove such a disease hereditary; said attorney then stated he would concede that other members of the family have shown strange and unusual conduct. The question was then repeated, was objected to and excluded:

Held, no error. (*Id.*)

85. *It seems*, that in such a case it is competent, in aid of other proof tending to justify an inference of insanity at the time of the commission of the act to show that the prisoner inherited a disease

which predisposed him to insanity, and also to show insanity of parents or relatives. (*Id.*)

86. The order of proof, however, is in the discretion of the court. (*Id.*)

87. In an action brought for admeasurement of dower, defendants denied plaintiff's marriage with B., the deceased. No formal marriage or express agreement between the parties was proved. Plaintiff's evidence showed cohabitation continued for a long period of time and up to the death of B., characterized by general repute and by conduct and conversation tending to show an intercourse matrimonial instead of meretricious. This was under an assumed name, however, and in another locality; among his relatives and friends the deceased occupied rooms and lived as a bachelor, his connection with plaintiff being unknown. Defendants were permitted to prove, under objection and exception, by numerous witnesses, who were the friends and acquaintances of B., but who did not know the plaintiff and were ignorant of her cohabitation with B.; that he was reputed to be a bachelor:

Held, error; that the repute thus proved did not tend to explain or show the character of the cohabitation; that while it was proper to prove that B., among his friends and relatives, lived as a single man, that he was reputed to be unmarried among those who thus saw him and before whom nothing had occurred to raise the question, was mere hearsay, which explained nothing. (*Badger* agt. *Badger*, 88 N. Y., 546.)

88. The repute, proper to be shown in such case, cannot go beyond the range of knowledge of the cohabitation; within that range, to contradict the repute of marriage, which to be effective must be general, a divided repute may be shown, *i. e.*, that among some

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friends and acquaintances the connection was reputed to be illicit, not matrimonial. (*Id.*)

39. Plaintiff offered in evidence a letter, the body of which was in the handwriting of the deceased, but signed by plaintiff as "Mrs. Mary Baker," the latter being the assumed name under which they lived together. The letter was written to a nephew of hers, congratulating him upon his marriage and containing such expressions as these: "We wish you much joy." "We expected a visit from you and your wife." The nephew also testified that B. asked him afterward if he received the letter. The letter was excluded:

Held, error; that it was to be regarded as the joint act of plaintiff and B., and its signature was a representation that she was a married woman; the letter itself was material on that point, and was admissible as part of the *res gesta*. (*Id.*)

40. W., a witness for plaintiff, testified to a conversation between himself and B., at a house where the sister of the latter lived, in which he stated that he had been married, but it wouldn't do to let "the women" know it. The defendants' counsel asked the witness if he did not have another conversation with B. in the presence of the sister of the latter, in which he stated that "he was not married;" this the witness denied. The sister was thereafter called as a witness for the defense, and was asked as to such a conversation. This was objected to generally; the court admitted it to contradict W. "and not as a declaration of deceased:"

Held, that the evidence was relevant and material, and so a general objection was not tenable.

Also, *held*, that defendant was not bound by the answer of W., as the evidence was not collateral but bore upon the issue; and that the sister was a competent witness

(*Code*, sec. 829), as it was not a personal transaction between her and deceased. (*Id.*)

41. Upon the trial of an indictment for wrongfully attempting to obtain public moneys from the county of A. by means of a fraudulent undertaker's bill, it appeared that among the items in the account presented by the prisoner was one for the burial and taking care of the body of K. The prosecution proved by one C. that he made a contract with the prisoner to pay twenty-four dollars for the entire expenses of the burial, which sum was paid by C.; the latter also testified that prior to making such contract, he had made a contract with A. to perform the same services, but at the request of the widow of the deceased, had employed the prisoner. The prisoner testified that his agreement with C. was simply for the coffin. A. was called as a witness for the prosecution, and on being recalled by the defense was asked: "Do you remember the price of the coffin you were to furnish?" This was objected to as irrelevant and immaterial, and excluded:

Held, no error. (*People* agt. *Bragle*, 88 N. Y., 585.)

42. The rule that parol evidence may not be given to contradict or vary a written contract applies only to the parties to it or their privies; in an action between one of the parties and a stranger neither is concluded by the contract, but either may give evidence differing from it. (*Lowell Manuf. Co. agt. Safeguard F. Ins. Co.*, 88 N. Y., 591.)

43. In an action against a street railroad company to recover damages for an injury the evidence was conflicting as to the circumstances of the accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and an-

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other witness for defendant that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car-driver who had been discharged by defendant, was asked on cross-examination, in substance, if he did not have a conversation with P., another car-driver, in which he sought to induce P. to testify falsely that his brakes were out of order, so as to fix the company with liability, in another case; this R. denied. P. was called as a witness for the defendant, and the offer was made to prove by him such a conversation; this was objected to and excluded:

Held, error. (Schultz agt. Third Ave. R. R. Co., 89 N. Y., 242.)

44. It is competent for a party against whom a witness has been called to prove acts or declarations of his showing feelings of hostility or malice on his part toward such party. If upon cross-examination he denies such facts, they may be proved by other witnesses, as the inquiry into his state of feeling toward the party is not collateral. (*Id.*)

45. *It seems*, however, that the evidence to show hostile feelings of a witness should be direct and positive and not very remote. (*Id.*)

46. Prior to March 27, 1875, plaintiffs, who were partners doing business at Rochester, had had extensive business transactions with defendants, who were commission merchants in New York, and the parties had been in the habit of exchanging credits. Plaintiffs had sent to the defendants four notes to take up other paper about maturing, which notes defendants had negotiated and used. On that day defendant S. wrote to plaintiffs, stating in substance that they had not used said notes and had themselves paid the paper they were given to renew. And on April 2, 1875, said defendant wrote again asking for four other notes. These

plaintiffs sent in reliance upon the statements that the other notes had not been used. Defendants received and negotiated them, using the proceeds. Soon after defendants failed; petitions in bankruptcy were filed against them and they were discharged, being then indebted to plaintiffs on all their accounts and transactions about \$1,000, aside from the proceeds of the four notes, which having passed into the hands of *bona fide* holders, plaintiffs were obliged to pay. In an action to recover damages because of the false representation:

Held, that plaintiffs were properly allowed to testify that they sent the last notes in reliance upon said representations; and that a refusal to permit the defendants H. to testify that they did not have any intention to defraud was not error; nor was a refusal to allow defendants to testify for what purpose the last four notes were obtained. (*Bradner agt. Strong, 89 N. Y., 299.*)

47. Plaintiff B. testified, without objection, that a few months after the failure he was told by defendant S. that when he got his discharge he would have the ability and disposition to make an honorable settlement with plaintiffs. Defendants' counsel requested the court to charge the jury to disregard such evidence. The court made no mention of it in its charge:

Held, that the evidence was immaterial and the refusal to grant the request was not error. (*Id.*)

48. *It seems*, that if the evidence was regarded by defendants' counsel as prejudicial, it should have been objected to when offered. (*Id.*)

49. Where the certified copy of the minutes of the court furnished the keeper of a penitentiary imperfectly described the crime of which the prisoner was convicted:

Held, that the keeper could,

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upon return to a writ of *habeas corpus*, show by the records of the court what the precise crime was; and so that the sentence was legal, and the detention authorized. (*People ex rel. Trainor agt. Baker*, 89 N. Y., 460.)

50. *It seems*, that this cannot be shown by parol evidence, but should be proved by the records. (*Id.*)

EXAMINATION OF PARTY.

1. The plaintiff examined the defendant as a witness before the trial. He subpoenaed her as a witness upon the trial, and, without having read her deposition taken before the trial, sought to have her sworn in order to prove facts about which she had not been examined, and to ask some questions inadvertently omitted on the prior examination. The court ruled that the plaintiff, having examined the defendant as a witness before the trial, could not call her as a witness, and refused to allow her to be sworn:

Held, that this was error. (*Berdell agt. Berdell*, 27 Hun, 23.)

2. In an action brought to recover property alleged to have been wrongfully taken and detained, the defendant cannot be required to appear and be examined as a witness before the trial, when it appears that the entire object of the examination is to show by his own testimony, and from his books and papers, that he procured the property from the plaintiff by means of false and fraudulent representations concerning his circumstances and ability to pay therefor. (*Yamato Trading Co. agt. Brown*, 27 Hun, 248.)

EXCEPTIONS.

1. The comments of the trial court in its charge upon the testimony

are not ordinarily the subject of legal exceptions so long as the questions of fact are left with the jury with instructions that they are the sole judges thereof. (*Sindram agt. People*, 88 N. Y., 196.)

2. As to whether such comments may not be carried so far as to afford ground for assigning error, *quere*. (*Id.*)

3. Plaintiff's complaint alleged that defendant had constructed an embankment on the side of the M. river, thus narrowing its channel, so that in times of floods the water was thrown in unusual quantities upon her land contiguous to the river on the opposite side; on the trial evidence was offered by plaintiff, showing damage caused by the raising of defendant's road-bed: this was objected to on the ground that it was not alleged in the complaint, and that no liability accrued in raising the tracks: the objection was overruled and defendant excepted. The referee found that at a time specified, defendant, to prevent its tracks from being flooded, raised the bed of its road and built an embankment out into the river, causing the current to flow on and over plaintiff's lands, damaging them to an amount specified; that at another time for the purpose of laying additional tracks, defendant built said embankment further out into the river, causing further injury to an amount specified; that a portion of the damage was caused by raising the road-bed; that the embankments were built in a workmanlike and skillful manner, and as a conclusion of law, that defendant was liable for such damages. Defendant's counsel excepted in the following form, "separately to each and every of the referee's findings of fact," save as to one that was specified, and also excepted to the conclusion of law:

Held, that although there was no evidence justifying the findings

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- that defendant at the time first specified, when raising its road-bed, built an embankment into the river, and such finding was therefore error; there was no exception presenting this error; but that the exception to the evidence as to the damages caused by raising the road-bed, and to the conclusion of law that defendant was liable for such damages, presented the question as to its liability, and that such exceptions were well taken. (*Moyer* agt. *N. Y. C., etc.*, 88 *N. Y.*, 351.)
4. The right of review by an appellate court in a criminal action is limited to exceptions taken on the trial to the decisions of the court, and to errors appearing upon the face of the record. (*Walsh* agt. *People*, 88 *N. Y.*, 458.)
 5. Exceptions taken upon the trial of specific questions of fact arising in an equity action and ordered to be answered by a jury should be presented for review before final judgment; they may not be considered on motion for a new trial of the action after judgment. (*Chapin* agt. *Thompson*, 89 *N. Y.*, 270.)
- ### EXECUTIONS.
1. A sale of real estate belonging to the defendant under an execution issued in an action against a non-resident wherein the service of the summons was by publication, and no attachment was issued, gives no title to the purchaser. (*McKinney* agt. *Collins*, 88 *N. Y.*, 216.)
 2. The method of adjustment, by taxation, of sheriff's fees on execution, applies only to such items as are prescribed by law; it has no application to an item the amount of which depends upon agreement. (*McKeon* agt. *Horsfall*, 88 *N. Y.*, 429.)
 3. Upon such a taxation, therefore, the sheriff is not entitled to an allowance for "auctioneer's" fees or for "keeper's" fees, save "where an execution has been staid after levy," and under the provision of the Code of Civil Procedure (*sec.* 3307, *subd.* 7), an allowance has been made by "the court or a judge thereof," to the sheriff "for his trouble and expenses in taking care of and preserving the property." (*Id.*)
 4. The provisions of the Revised Statutes (2 *R. S.*, 116, *secs.* 19, 20, 21), in regard to the issuing of executions upon a judgment obtained against "any executor or administrator after a trial at law," relate only to a case where such representative has disputed the debt and subjected the creditor to a litigation; no preference is given to the judgment creditor, and execution, if one is permitted by the surrogate, is to be paid only in the proportion paid to other creditors. (*Schmitz* agt. *Langharr*, 88 *N. Y.*, 503.)
 5. Where one claiming to redeem lands sold under execution delivered to the sheriff a certified copy of the docket of a judgment in which he, as survivor of himself and another named, was described as plaintiff, and also an affidavit to the effect that he was the owner and holder of the judgment mentioned in the copy of the docket, and that there was due thereon an amount specified:
Held, that the papers were sufficient under the Code of Civil Procedure (*sec.* 1464), to entitle him to redeem; that it was not necessary to present any assignment of the judgment to himself, or to add to the statement in the affidavit any words showing his identity with the judgment creditor, as he appeared upon the face of the papers to be the owner of the judgment. (*Nehrbass* agt. *Biss*, 88 *N. Y.*, 600.)

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6. An omission in an execution of a teste, in the name of a judge of the court, or of a direction as to the time of its return required by the Code of Civil Procedure (*secs. 23, 1886*), is a mere irregularity, which may be amended or disregarded, and of which the sheriff, either in his official character or as bail, cannot take advantage. (*Douglas agt. Habestro, 88 N. Y., 611.*)
7. Defendant, a sheriff, under an order of arrest, issued in an action brought by plaintiff against W., arrested the latter and discharged him on his giving bail. The sureties were excepted to and failed to justify. In an action to enforce defendant's liability as bail, the complaint alleged the recovery of a judgment against W., the issuing of an execution against his person, on March 17, 1879, and its return by the sheriff "defendant not found" on April 8, 1879. The answer alleged in substance that said execution was returned by the deputy sheriff without the knowledge or consent of the defendant at the request and by the direction of plaintiff's attorney, in order that this action might be commenced. On the trial defendant offered to prove this portion of the answer, but the proof was rejected as constituting no defense:
Held, error; that the answer should be read in connection with the allegations of the complaint; that the direction to plaintiff's attorney to return at the time it was made, when the defendant had more than forty days remaining within which to produce his prisoner, was a direction to prevent service of the execution, and so was a defense under the provision of the Code of Civil Procedure (*sec. 599*), specifying defenses in actions against bail; that it is not essential to a defense under said provision to allege or prove that the direction was fraudulent or collusive. (*Id.*)
8. Also *held*, that treating the act of the deputy as that of defendant, still the defense was good; that the direction to return the execution was a waiver of defendant's liability as bail; that the provisions of the Code (*secs. 595, 598*) prescribing the duties and liabilities of a sheriff upon an execution do not make that officer liable to a party giving directions which prevent service of the writ because of obedience to such directions. (*Id.*)
9. A petition, on application to discharge from arrest one held in custody, on execution in describing the judgment upon which the execution was issued, gave the name of but one of two plaintiffs and but one (the one under arrest) of two defendants. It appeared that the prisoner was held under but the one execution. In an action against the sheriff, who, acting upon an order of discharge granted in the proceedings so instituted, discharged the debtor for an escape:
Held, that the omission to name all the parties in the petition was not a fatal defect. (*Goodwin agt. Griffiths, 88 N. Y., 629.*)
10. Upon the petition was indorsed an admission of service signed with the name of G., the plaintiff named therein, with an affidavit of the petitioner's attorney, to the effect that he knew G. and saw him sign. It appeared that G. with his counsel was present before the county judge upon the examination in the proceedings, and that the other plaintiff, at the time the proceedings were instituted, was a non-resident and not in the state. There was evidence also that G. was in fact the sole owner of the judgment:
Held, that the proof showed a substantial compliance with the statute (*3 R. S., § 1, sec. 3*), requiring personal service of the petition upon the creditors, at whose suit the debtor is imprisoned; that it

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was not necessary to serve upon the other plaintiff. (*Id.*)

11. The notice of application for the discharge stated that it would be made at a term of the county court to be held at the courthouse; the order upon its face showed it to have been granted at a term held at the office of the county judge:

Held, it was to be presumed that said office was at the place specified in the notice, i. e., the courthouse, and that the order was made at a regular term of said court. (*Id.*)

12. No order of arrest was issued in the action upon the judgment wherein the execution was issued under which the debtor was imprisoned. The complaint therein alleged, in substance, the ownership by plaintiffs and K., one of the defendants, as partners, of certain machinery, etc., the dissolution of the partnership, and the taking of said machinery out of the state by defendants, thus excluding plaintiffs from any use thereof. There was no averment of an unlawful taking, or that any more than K.'s share of the property was taken. Plaintiffs asked to recover the value of their interest in the property:

Held, that plaintiffs had a right to waive, and the complaint showed an intent to waive, any alleged tort, and the action was one in its nature *ex contractu*; and that, therefore, a body execution was illegally issued. (*Id.*)

13. Also, *held*, that the invalidity of the process was not waived, because the defendant remained for a time in custody, or by the omission to deny in the answer of the sheriff that execution was duly issued. (*Id.*)

14. The provision of the Code of Civil Procedure (sec. 1440, as amended by sec. 2, chap. 881, Laws

of 1881), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee. (*McIntyre* agt. *Sanford*, 80 N. Y., 634.)

See DISTRICT COURTS.

Searing agt. *Goodstein*, ante, 437.

FEES.

1. There is no statute providing for the commissions to be paid to special guardians appointed in proceedings to sell infant's real estate, or fixing the costs and expenses which may be allowed in conducting the same, or the fees of the attorney or referee. All the costs and allowances which can be charged upon the fund are within the discretion of the court, and are fixed and provided for in the rules of the court. (*Matter of Matthews*, 37 Hun, 254.)

FERRIES.

1. A person running regular trips with a steamboat from One Hundred and Twenty-ninth street, North river, to Fort Lee, New Jersey, under a coasting license, when a ferry has been established from One Hundred and Thirty-second street to Fort Lee, is attempting to use a ferry franchise which the corporation of the city of New York has the exclusive right to grant; and an injunction will lie to restrain such persons from interference and competition with such ferry franchise. (*The Mayor* agt. *Longstreet*, ante, 30.)

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FINDINGS OF LAW AND FACT.

1. Where a referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law. (*Bonnell* agt. *Grinwald*, 89 N. Y., 122.)

FOREIGN CORPORATION.

1. The superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer. (*Brooks et al.* agt. *Mexican National Construction Company*, ante, 364.)

GAS COMPANIES.

1. The law of 1859, allowing gas companies to stop the supply of gas in case of the non-payment of bills for the gas, has not made the gas company the sole judge of the question whether any, and, if so, what amount of remuneration is due to it; nor has the right of a party to resort to the courts to have the question whether a case has arisen in which the company is justified in cutting off his supply of gas, and to have the amount due ascertained and settled, been taken away. (*Sickles* agt. *Manhattan Gas Light Company*, ante, 38.)
2. When a dispute arises between the company and a consumer, the latter is entitled to have his rights investigated by the courts. (*Id.*)
3. In such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried. (*Id.*)

GENERAL TERM.

1. The general term of the supreme court, except as limited by statute, has all the power and all the general jurisdiction of the supreme court. (*Syr. Sav'gs Bk.* agt. *Syr. C. and N. Y. R. R. Co.*, 88 N. Y., 110.)
2. Said general term has the power to attach any conditions it sees fit to the affirmance of an order of special term, when the vacating or affirmance of the order is within its discretion. (*Id.*)
3. Where a complaint sets forth two distinct and separate causes of action, and a recovery is had upon both, the general term has power upon appeal, with plaintiffs' assent, to reverse the judgment as to one, and affirm it as to the other. (*Crim* agt. *Starkweather*, 88 N. Y., 339.)
4. A proceeding to punish for a contempt of court is a criminal proceeding, and the general term, on reversal of an order of special term, adjudging a person in contempt, has no authority to impose costs upon the relator. (*People ex rel.* agt. *Gilmore*, 88 N. Y., 626.)
5. The general term of the supreme court, on affirmance of an order overruling a demurrer to the complaint in an action, has the same power before possessed by the special term (*Code of Civil Procedure*, sec. 1031), to designate what kind of an interlocutory judgment and final judgment shall be entered. (*Smith* agt. *Rathbun*, 88 N. Y., 660.)

HABEAS CORPUS.

1. Under the Revised Statutes, a justice of the supreme court had power to allow the writ of *habeas corpus* in whatever part of the state the prisoner might be detained. (*The People ex rel. Clarke* agt. *Clarke*, ante, 7.)

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2. Under the Code of Civil Procedure, a justice of the supreme court in any part of the state may issue the writ. (*Id.*)

HABITUAL DRUNKARD.

1. An inquisition finding a person an habitual drunkard was signed December 18, 1879, but not filed in the county clerk's office until December 7, 1880, when a committee was appointed. Between those dates, the drunkard, who seemed to have capacity for business and attended to some of his affairs, contracted a debt with one who had no knowledge of the pendency of the proceedings:

Held, that the debt was recoverable. (*Matter of McGarvey*, ante, 185.)

2. Testimony that a party who was not a lodger in an inn, tavern or hotel, had drinks, without further proof that they were either strong or spirituous liquors or wines, will not defeat a claim for said drinks under the provisions of the Revised Statutes (2 R. S. [6th ed.], 937, sec. 16). (*Id.*)

HUSBAND AND WIFE.

1. Where a wife, as the agent of her husband, contracts an indebtedness for the support of herself and her children, she is not personally liable for the debt; and where payment is sought from her separate estate the proceedings to recover for such indebtedness must be against the husband; and in those proceedings the wife's property must be devoted to the payment of the judgment against the husband. (*Reilly* agt. *Roache*, ante, 87.)

2. Where plaintiff sued her mother to recover property real, leasehold, and also the proceeds of such real property sold by defendant, alleging that it was formerly the property of her father, because pur-

chased with her mother's earnings, to which her father had the legal right by virtue of his sustaining the relation of husband to defendant:

Held, first. "The doctrine that by marriage the defendant's property vested in her husband, and that after marriage her earnings belonged to him," though applicable "at law and in favor of creditors," yet "in equity it has been otherwise."

Second. "And it is impossible to see how a mere volunteer can derive from it any support in a prosecution which, if successful, would defeat a legal estate acquired with the husband's consent." (*Mason* agt. *Libby*, ante, 239.)

See AGREEMENT OF SEPARATION.
Allen agt. *Affleck*, ante, 880.

3. Money due from a wife to her husband, for services under an employment by her in her separate business, cannot be reached in an action against the wife by a creditor of the husband, after a judgment and execution against him returned unsatisfied. (*Kingman* agt. *Frank*, ante, 590.)

INJUNCTION.

See GAS COMPANIES.

Sickles agt. *Manhattan Gas Light Company*, ante, 33.

1. An injunction will not be granted to restrain the execution of a warrant issued in a proceeding for forcible entry and detainer, pending an appeal from the judgment entered in said proceeding. (*Coster* et al. agt. *Van Schaeck* et al., ante, 100.)
2. In an action brought by a resident and taxpayer of a municipal corporation against the comptroller of such corporation, under the act for the protection of taxpayers (*Laws* of 1881, chap. 531), the plaintiff must, upon the com-

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ment of such action, give a bond as in such act specified. (*Tappen agt. Crissey, ante, 496.*)

3. Such bond must be in the form prescribed by the act, and must be under seal. (*Id.*)

4. A compliance with sections 620, 621, of the Code of Civil Procedure as to security, does not obviate the necessity of complying with the provisions of this statute. (*Id.*)

5. Where a motion is made to dissolve an injunction granted under the act of 1881, without the giving of such a bond upon the commencement of the action, the court, at special term, has power in a proper case to permit such bond to be filed *nunc pro tunc*. (*Id.*)

6. If the court intervenes to enjoin an officer in what he claims to be his official duty, a plain case should be established by the party asking such interference. It is not sufficient for the plaintiff in such an action to show that the act he seeks to enjoin is one of doubtful propriety. (*Id.*)

7. Where, on a motion to dissolve an injunction which had been granted restraining the defendant, who is the comptroller of the city of Troy, from countersigning any draft or drafts which might be drawn for the purpose of paying the police force of the city of Troy, of which John McKenna was the superintendent, and from countersigning any draft or drafts which might be drawn for the purpose of paying the police force of said city or any part thereof, signed by police commissioner Cavanaugh and police commissioner Hannan, until the further order of the court, the plaintiff, in support of the injunction, presented a case showing a doubtful question as to which of the two bodies of men claiming to be the

police force of the city of Troy, is the legal one:

Held, that such doubt is not sufficient to justify the court in declaring, by its order maintaining the injunction, that the defendant was about to do an illegal official act, and waste or injure the property, funds or estate of the municipal corporation of which he is an officer. (*Id.*)

8. Counsel fees, incurred by defendant for services in an action other than those made necessary by a temporary injunction therein, cannot be assessed as damages upon the undertaking given on granting the injunction. (*Randall agt. Carpenter, 88 N. Y., 298.*)

9. So, also, fees for services of counsel in unsuccessfully resisting the allowance of the injunction are not allowable as damages by reason of the injunction. (*Id.*)

10. Where, in proceedings by reference to assess defendant's damages by reason of a temporary injunction, no damages for which plaintiff is liable are shown, he cannot be required to pay the expenses of the reference. (*Id.*)

INSURANCE (LIFE).

1. Reinsurance of policies by a life insurance company formed under chapter 463 of the Laws of 1853 is no excuse for failure by policyholders for ten years to pay premiums, the act of the company in reinsuring not being a violation of its contract with the policyholders, and if it was, they should have acted with reasonable promptness. (*Matter of Empire Mutual Life Insurance Co., ante, 51.*)
2. Where a receiver was appointed in a proceeding, instituted by the attorney-general, pursuant to chapter 463 of the Laws of 1853, for the purpose of dissolving an insolvent insurance company and distribut-

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ing its assets, and by an order of the court the day was fixed (June 15, 1879), before which time the creditors of this corporation were required to file their claims. The claims represented by these motions were presented to the receiver prior to June 16, 1879. They were all at that time running policies, and were valued as such in the declaration and payment of a cash dividend, which was ordered by this court October 8, 1879. Between June 16, 1879, and January 1, 1881, the holders of these policies died, and on the eighth day of January of the latter year a motion was made for their revaluation because of such death:

Held, that the damages of every policy of insurance should be computed according to the facts as they existed upon the last day of presentation of claims to the receiver, and that in the exercise of a sound discretion the court should not take into consideration the fact that death had subsequently occurred in making such computation.

Held, further, that when the policies had been valued, and a dividend made which was ascertained and computed upon the facts as they existed on the day when claims were required to be presented, they should not again be revalued because a death had since occurred. (*Matter of Attorney-General agt. Continental Life Insurance Co.*, ante, 78.)

3. When a life insurance company has contracted with a person to act as its general agent for a stipulated number of years, at a specified yearly salary, and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the state before the expiration of the term for which such agent was hired, the agent has no legal right to recover from the funds in the hands of the receiver the salary fixed by the agreement for the

unexpired term of service, as damages for not continuing the employment; the contract ends with the corporate dissolution by the action of the state, and because such action prevented further service, the agent has no valid claim for damages for an alleged breach of the agreement by the company. (*The People agt. Globe Mutual Life Insurance Co.*, ante, 240.)

4. When, by the contract between the general agent and the company, the former is, upon the procurement by him of a policy of insurance, to be paid a certain per cent upon the first premium received from the insured, and also a per cent upon every renewal premium thereafter paid, and the payment of renewal premiums upon policies of insurance procured by such agent is prevented by the insolvency of the company, the appointment of a receiver and its dissolution by the state, no damages can be recovered by such agent by reason of the non-renewal of policies, which he had procured prior to such insolvency, receiver ship and corporate death. (*Id.*)
5. When a general agent, whose compensation depended in part upon his success in procuring policies of insurances, to be taken in a life insurance company, upon which policies, when procured by him, he was to receive an agreed per cent upon the premiums paid, is before the expiration of the period for which he was employed by such company, prevented by the insolvency receivership and dissolution of such company, at the suit of the people of the state, from obtaining in it further policies of insurance, he is not entitled to damages by reason of his being thus deprived of the opportunity to earn money during the unexpired term of his agency by procuring policies of insurance in such company. (*Id.*)

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6. Where a life insurance company has contracted with a person to act as its general agent for a stipulated number of years at a specified yearly salary and the company becomes insolvent and passes into the hands of a receiver, and is also dissolved by the action of the state before the expiration of the term for which such agent was hired, such agent has no legal right to recover from the fund in the hands of the receiver the salary fixed by the agreement for the unexpired term of service as damages for not continuing the employment, the contract having ended with the corporate dissolution by the action of the state, and there is no valid claim for damages for an alleged breach of the agreement by the company (*See S. C., ante, 240.*) (*The People agt. Globe Mutual Life Insurance Co., ante, 485.*)

7. Where a party failed to pay the premium upon his policy of life insurance which became due six months prior to the failure of the company and the appointment of a receiver:

Held, that if he wished to be excused from the consequences of his omission to perform his part of the contract he must at least show his readiness and willingness to perform, and that he refused performance upon the ground that the other party had broken the contract by allowing itself to become insolvent. (*Master of Attorney-General agt. Continental Life Ins. Co., ante, 519.*)

INTERPLEADER.

1. The district courts of the city of New York have power to grant orders of interpleader, and such power is not taken away or affected by the Code of Civil Procedure. (*Beer agt. Benner, ante, 235.*)

2. Where, in an action brought against the city of New York to

recover the amount of an award made to the owner of land taken for the opening of a street therein, it appears that a third person has filed with the department of finance a notice by which he claims an interest in the award to the extent of the amount due upon a mortgage held by him against the property taken, it is proper for the court acting under section 820 of the Code of Civil Procedure to make an order substituting the said claimant as a defendant in the place of the city and requiring the latter to pay over the amount in dispute to its chamberlain. (*Barnes agt. Mayor, 27 Hun, 236.*)

3. When proper as between conflicting claimants to deposits in savings bank. (*Mulcahey agt. E. I. S. Bk., 89 N. Y., 436.*)

JUDGMENT.

1. After the settlement of a general term order, and the taxation of costs the entry of judgment follows, as matter of course, in conformity to the order, no notice of entry of judgment being required. (*Caro et al. agt. Metropolitan Railroad Company, ante, 225.*)

2. When a judgment is docketed, upon the decision or order for judgment, without any judgment-roll having been made up and filed, the court will set aside an execution thereafter issued upon the judgment docket, unless the defect be cured and a proper judgment-roll be made up within a reasonable time. (*Blashfield agt. Smith, 27 Hun, 114.*)

3. Under the Code of Procedure a money judgment against a non-resident upon whom there is no personal service of summons, but service was made by publication, and who did not appear in the action, cannot affect any property of the defendant except such as has been taken by virtue of an

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attachment regularly issued in the action. (*McKinney* agt. *Collins*, 88 N. Y., 216.)

4. Where a judgment by default, of a court of general jurisdiction, recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction or affect the validity of the judgment. (*Maples* agt. *Mackey*, 89 N. Y., 146.)

5. All intendments are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown. (*Id.*)

6. *It seems*, that upon motion made to vacate a judgment because of informality of the proof of service of the summons, the informality may be cured by amendment. (*Id.*)

7. The statute of limitations was not a defense to a proceeding under the Code of Procedure (sec. 375), to make a judgment, recovered against one or more of several persons jointly indebted upon a contract, binding upon one not originally served with the summons, unless such defense existed at the time the action was commenced. The action was commenced by service of summons on the joint contractor (sec. 49), and the proceeding was not a new action but a proceeding at the foot of the judgment. (*Id.*)

8. The provision of said Code (sec. 379), giving to the one sought to be charged by such proceeding the right to set up any defense which may have arisen subsequent to the judgment, places him in as good a position as though judgment had not been entered, but in no better. (*Id.*)

9. A certified copy of judgment de-

scribed the offense of which the prisoner was convicted as "an assault and resisting an officer;" the sentence was imprisonment for one year and a fine of \$500, the prisoner to stand committed until payment, etc.:

Held, that this did not describe the crime of resisting the execution of process within the meaning of the statutory provision declaring that offense (sec. 17, chap. 69, *Laws of 1845*), but simply showed a conviction for an assault and battery. (*People ex rel. Trainor* agt. *Baker*, 89 N. Y., 469.)

10. The provision of the Code of Civil Procedure (sec. 1440, as amended by sec. 2, chap. 681, *Laws of 1881*), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee. (*McIntyre* agt. *Sanford*, 89 N. Y., 634.)

JUDICIAL SALE.

1. The provision of the Code of Civil Procedure (sec. 1440, as amended by sec. 2, chap. 681, *Laws of 1881*), providing that if the title of one claiming under a sheriff's deed land sold on execution is adjudged void in an action brought by the judgment debtor, the judgment shall have no force unless the plaintiff shall pay, within the time specified, the amount paid on the sale, with interest, costs and expenses, etc., has no application in an action wherein relief is sought against a fraudulent act of such grantee. (*McIntyre* agt. *Sanford*, 89 N. Y., 634.)

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JURISDICTION.

1. The superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer. (*Brooks et al. agt. Mexican National Construction Company, ante, 344.*)
2. A surrogate having made an order vacating a decree admitting a will to probate, an appeal was taken therefrom to the general term. During the pendency of this appeal an order was made at a special term of the supreme court by which a receiver of the estate of the testator was appointed:
Held, that the court had not jurisdiction to make the order. (*Matter of Hancock, 27 Hun, 575.*)
3. A court martial consisting of one officer has no jurisdiction to try a person accused of disobedience of orders. Such a charge can only be tried by a court consisting of three officers.
A court consisting of one officer cannot acquire jurisdiction to try one accused of such offense by reason of his failure to plead its want of power. (*Matter of Leary, 27 Hun, 564.*)
4. The United States, by voluntarily appearing in a state court as a claimant to a fund therein, subjects itself to the jurisdiction of the court, and will be bound by its decision. (*Johnston agt. Stimmel, 80 N. Y., 117.*)
5. Where a judgment by default, of a court of general jurisdiction, recites that the summons was personally served upon a defendant, the recital is sufficient to show that the court acquired jurisdiction, and a defect in the proof of service attached to the judgment-roll does not show want of jurisdiction or affect the validity of the judgment. (*Maples agt. Mackey, 80 N. Y., 146.*)
6. All intendments are in favor of the validity of the judgment, until want of jurisdiction is affirmatively shown. (*Id.*)
7. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to guide the action of a trustee. (*Wager agt. Wager, 89 N. Y., 161.*)
8. An executor is always a trustee of the personal estate of the testator, and can be called to account therefor as such in a court of equity, although no express trust be created by the will. (*Id.*)
9. *It seems*, that where complete relief can be obtained in a surrogate's court, a court of equity, while it has jurisdiction, may in its discretion decline to entertain an action for an accounting or other relief against executors. (*Id.*)
10. An heir at law or devisee, who claims a mere legal estate in real property, when there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. (*Id.*)
11. Where, however, the court has obtained jurisdiction for the purpose of establishing the equitable rights of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy. (*Id.*)
12. A surrogate's court can only exercise the powers prescribed by statute, and such incidental powers as are requisite to the exercise of the powers expressly given, or to the attainment of justice in the cases to which its jurisdiction extends. Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, either given expressly or by implication, the whole proceed-

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ings are void. (*Riggs* agt. *Cragg*, 89 N. Y., 479.)

13. In proceedings under the statute (2 R. S., 230, sec. 1), for a special accounting of an executor, at the instance of a legatee, to enforce the payment of a legacy, the surrogate has only jurisdiction to decree payment where the legacy is undisputed. When upon such an application the surrogate can see that other persons may claim, and a real question is presented as to the right of one of several persons to the legacy or fund, he may not proceed to a determination without the presence of all the parties who may be affected by the adjudication; these can only be brought in upon a final accounting, and only in that proceeding has the surrogate jurisdiction to settle and adjust conflicting rights and interests. (*Id.*)

14. *It seems*, that a surrogate has jurisdiction to pass upon the construction of a will, where the right to a legacy depends upon a question of construction which must be determined before a decree of distribution can be made. (*Id.*)

JURORS.

See PRACTICE.

The People agt. *Petrea*, ante, 139.

JURY.

1. In an action upon a bond given by a married woman to secure a debt due from her husband, the defense was that after the execution of the bond, a clause charging her separate estate with its payment had been inserted without her knowledge or consent. The clause appeared, from an examination of the bond, to have been inserted after it was first drawn. The plaintiff and the attorney who prepared the bond testified that the clause was in-

serted in the bond before it was executed:

Held, that the question as to when the clause was inserted in the bond, should have been left to the jury, and that the court erred in directing a verdict in favor of the plaintiff. (*Pease* agt. *Barnett*, 37 Hun, 378.)

JUSTICE'S COURTS.

1. In reviewing justices' judgments, no exception to the ruling of the justice is necessary. (*Collins* agt. *Rockwood*, ante, 57.)
2. Where a book was offered in evidence and objected to as incompetent:
- Held*, that the objection was sufficiently definite. (*Id.*)

See APPEAL.

Matteson agt. *Hall*, ante, 515.

JUSTICES OF THE PEACE.

1. A justice of the peace, before whom summary proceedings are instituted, has four days within which to make his decision. (*People ex rel. White* agt. *Loomis*, 37 Hun, 323.)

LACHES.

See LEASE.

N. Y. Life Ins. and Trust Co. agt. *The Recur, &c., St. George's Church*, ante, 511.

LEASE.

1. Where plaintiff, the assignee of a long lease containing a covenant to renew, who omitted, by accident or mistake, to give notice of his option until thirty-six days after the contract time, sued to be relieved from a forfeiture of the lease, and it appeared that, prior

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to the alleged forfeiture, he had a vested interest in the property, to the extent, at least, of \$80,000, and plaintiff continued in possession, and defendant received the rent after the expiration of the term:

Held, that as time was not originally of the essence of the contract, and was not engrafted into it by subsequent notice, and the delay on plaintiff's part in expressing the option was not so great as to constitute laches, the plaintiff is entitled to judgment, requiring defendant to execute a renewal of the lease. (*N. Y. Life Ins. and Trust Co. agt. The Rector, etc., St. George's Church, ante, 511.*)

LEVY.

1. After the plaintiff had given a chattel mortgage upon a stock of goods owned by her, the goods were seized by a constable under an execution issued upon a judgment recovered against her. The defendants, who were then the owners of the chattel mortgage, brought an action of replevin against the constable and took the goods from him:

Held, that after the levy made by the constable the plaintiff had neither the possession nor the right to the possession of the goods and that she could not maintain an action against the defendants to recover any balance that might remain after deducting the amount due upon the defendant's mortgage and execution held by the constable.

That the constable holding the execution was entitled to recover of the defendants the full amount of the plaintiff's special interest in the goods levied upon and not merely the amount named in the execution; that consequently the defendants were not liable to the plaintiff for the same special interest. (*Michelson agt. Fowler, 27 Hun, 159.*)

LIMITATIONS (STATUTE OF).

1. The next of kin of a deceased intestate must institute proceedings within the time in which actions of a similar character are required to be commenced, to compel the administrator to account and to distribute the estate. (*Matter of Van Epps, ante, 464.*)
2. One Van Epps died intestate in 1858, and in that year H. Van Epps was appointed administrator. In 1883, A. Van Epps, one of the next of kin, applied by petition to the surrogate, to compel the administrator to account and for his share of the estate:

Held, that the lapse of time barred the application. (*Id.*)

LUNATIC.

1. In proceedings instituted for the purpose of inquiring as to the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind, to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate. A commission thereupon issues to one or more commissioners, who cause a jury to be summoned, before whom the investigation is had. This was the course pursued in this case, and on the hearing before the jury various objections were taken to the admission of evidence, and at the close of the proof counsel for the alleged lunatic insisted upon the right to address the jury on his behalf, which was refused by the commissioner. On motion to confirm:

Held, that the refusal of the commissioner to allow the counsel for the alleged lunatic the right to address the jury upon the evidence is error, and fatal to the motion to confirm the findings of

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the jury. (*Matter of Church, ante, 893.*)

MANDAMUS.

1. Where a peremptory *mandamus* is denied without an alternative *mandamus*, the court has no authority to award costs except as upon a motion. (*The People ex rel. Stilwell agt. The New York Produce Exchange, ante, 528.*)

See ELECTION LAW.

The People ex rel. Sanderson agt. Board of Canvassers of Greene Co., ante, 201.

See SUMMARY PROCEEDINGS.

The People ex rel. Cavanagh agt. McAdam, ante, 238.

See ELECTION LAW.

The People ex rel. Deuchler agt. Board of Canvassers of Wayne Co., ante, 324.

See ELECTION LAW.

Sanderson agt. Payne, ante, 357.

MARRIED WOMAN.

See CONTRACT.

Alexander agt. Shillaber, ante, 530.

MARINE COURT.

1. In a suit against a domestic corporation, brought in the marine court, the time in which an order, under section 1778 of the Code of Civil Procedure, must be served, is limited to six instead of twenty days. (*Schlegel agt. American Beer and Ale Bottling Company, ante, 196.*)

MASTER AND SERVANT.

See NEGLIGENCE.

Stringham agt. Stewart, ante, 5.

MECHANICS' LIEN.

1. The mechanics' lien law of 1880, applicable to all of the cities of the state of New York, except the city of Buffalo, does not apply to the city of New York, and the local act of 1875 (*chap. 378 of the Laws of 1875*), is the only lien law applicable to said city of New York. (*Hickey agt. Schesab, ante, 8.*)
2. Where a general law is passed which, but for the existence of a local act, would be held to apply to the city of New York, it will not, in the absence of express intention to repeal the local act, be held applicable to that locality:
Held, that a mechanic's lien filed for work performed on property in the city of New York, in accordance with the act of 1880, does not create a lien. (*Id.*)
3. Under the mechanics' lien law of 1875, which is applicable to the city of New York, a notice of *lis pendens*, filed on the ninety-first day after notice of lien, though the ninetieth day fell on a Sunday is of no effect, and the person filing the *lis pendens* has no standing in court as a lienor. (*Bouca al. agt. New York Christian Home, ante, 509.*)
4. All conditions of the statute must be strictly complied with, or the lien will be lost. (*Id.*)
5. Where a lien ceases by lapse of time, it cannot be revived. It becomes wholly void. (*Id.*)
6. The mechanics' lien law of 1875, applicable to the city and county of New York, was not repealed by chapter 486 of the Laws of 1880, which by its terms provided for the acquiring and enforcement of mechanics' liens in the cities of this state. (*McKenna agt. Edmonstone, ante, 461.*)
7. Under the law regulating mech-

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anics' liens, now in force in the city of New York, the court has jurisdiction to make an order canceling the lien on the giving of a bond. (*Id.*)

MORTGAGE.

1. The defendant, after having accepted a deed of certain premises with an assumption clause that the conveyance was subject to "all liens and incumbrances of record on the said premises," is estopped from contesting the validity of a mortgage upon the premises at that time upon record, and is liable for any deficiency that may arise upon the sale of the mortgaged premises upon foreclosure of said mortgage. (*Styles* agt. *Price*, ante, 227.)

MORTGAGE AGREEMENT.

1. The defendant corporation gave a first mortgage on its property and franchises, in which it was provided that \$12,500 of the surplus of its net earnings, after paying interest on the bonds secured by the mortgage, should be paid semi-annually to the mortgage trustees, as a sinking fund for the redemption of the bonds. The moneys in this fund, with the accumulations of interest thereon, were to be invested in the purchase of these bonds, if such purchase could be made at not exceeding ten per cent above par, the bonds so purchased to be indorsed as belonging to the sinking fund, and they were to "remain in force" and the interest thereon was to be continued to be paid as part of the capital of the sinking fund. In case the bonds could not be purchased at ten per cent above par, no further payment was to be made to the sinking fund until the price lowered to that point, when such payment of \$12,500 semi-annually was to be resumed. Purchases of bonds

were made until January, 1879, when they advanced in value beyond the limit imposed. But interest on the bonds held for the sinking fund continued to be paid. In this action, by a preferred stockholder of the corporation, to restrain this payment:

Held, (1) That the obligation to pay interest on the bonds in the sinking fund has not by the terms of the mortgage been suspended. (2) The provision of the Illinois statute, that the payments into the sinking fund shall not exceed two per cent of the gross earnings, means that such payment shall not exceed two per cent of the gross receipts of the year in which the payments are made; and at any rate, as the company already had a corporate existence under the laws of Indiana, the provision of the Illinois statute could not affect the terms of the mortgage agreement. (*Wilds* agt. *St. Louis, Alton and Terre Haute Railroad Co.*, ante, 418.)

MORTGAGE FORECLOSURE.

1. In an action for specific performance of a contract of sale of real property, the plaintiff's title to the premises being through a foreclosure of a mortgage by advertisement; the mortgagor was not served with the notice, but died pending the proceedings, leaving a widow and one child. The widow was served with the notice. No administrators of decedent's estate was appointed:
Held, that the title tendered by the plaintiff is not such as a court of equity ought to compel the defendant to accept. (*McKenzie* agt. *Alster*, ante, 888.)
2. The death of the mortgagor and the non-appointment of an administrator does not render the service of a notice of sale unnecessary. The court has no power to dispense with a positive provision of a statute. (*Id.*)

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MOTIONS AND ORDERS.

1. To justify an order directing judgment on the ground that a demurrer to the complaint is frivolous, it must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection and indicates that it was interposed in bad faith; if any argument is required to show that the demurrer is bad, it is not frivolous. (*Cook* agt. *Warren*, 88 *N. Y.*, 37.)
2. The general term of the supreme court has the power to attach any conditions it sees fit to the affirmance of an order of special term, when the vacating or affirmance of the order is within its discretion. (*Sy. Sv's Bk.* agt. *Syr. C. and N. Y. R. R.*, 88 *N. Y.*, 110.)
3. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. (*Hall* agt. *Brooks*, 89 *N. Y.*, 33.)
4. Where, however, such an order had been granted "with costs" and had been obeyed by the person holding the property, who claimed no interest therein:
Held, that he was not aggrieved by the order, and could not sustain an appeal therefrom, save so far as it imposed costs upon him. (*Id.*)
5. After the commencement of an action by the United States, in the United States Circuit Court, the defendant therein executed an assignment of a bond and mortgage, which was recorded; thereafter an attachment was issued in said action, which was levied on the mortgage debt, plaintiff claiming that the assignment was fraudulent and void. This action was then brought by the assignee to

foreclose the mortgage. Upon application of the owners of the equity of redemption the United States Circuit Court directed the levy to be discharged, unless the United States consented to appear and submit to the jurisdiction of the state court. Upon motion thereupon made in the foreclosure suit an order was granted substituting the United States as defendant, discharging the original defendant from liability, and directing plaintiff to satisfy the mortgage, upon payment into court of the amount due, with costs; with provision for the appearance of the United States, its submission to the jurisdiction of the court, and consent that the title to the mortgage debt be determined in the action; on default of such appearance and submission the moneys so paid in were directed to be paid to plaintiff:

Held, that the order was proper. (*Johnston* agt. *Stimmel*, 89 *N. Y.*, 117.)

6. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim:

Held, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. (*Mairs* agt. *Manhattan R. R. Ass'n*, 89 *N. Y.*, 498.)

NATIONAL BANK.

1. A national bank, organized under the laws of congress and located within this state, is, within the meaning of the Code, a domestic corporation, and may sue here a national bank without the

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state, or any foreign corporation, for any cause of action. (*Market National Bank of New York* agt. *Pacific National Bank of Boston*, ante, 1.)

2. A national bank cannot enter into a valid contract to undertake the business of the recovery of the stolen property of special depositors. (*Wylie* agt. *Northampton National Bank*, ante, 456.)

3. The directors might be liable individually. (*Id.*)

4. To recover against a bank for bonds left with the bank as a gratis bailment, something more is needed than the mere fact that they were stolen from the bank. (*Id.*)

5. A complaint claiming that the bank recovered \$1,500,000 back from the thieves, or an agreement that in consideration of such recovery the bank allowed the thieves to retain the property of plaintiff and other special depositors, states a valid cause of action, but here there is no proof sufficient to go to the jury as to this branch of this cause of action. (*Id.*)

6. In such an action the plaintiff will be held to proof of the allegations made, and will not be allowed to rest on proof of other negligence. (*Id.*)

NEGLIGENCE.

1. The plaintiff, who was a servant of defendant, was injured by the falling of an elevator used to hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised:

Held, that the defendant was not liable for such neglect of a

co-employee of plaintiff. (*Stringham* agt. *Stewart*, ante, 5.)

S e NATIONAL BANK.

Wylie agt. *Northampton National Bank*, ante, 456.

NEW TRIAL.

1. The plaintiff in error was tried upon an indictment charging him with burglary in the first degree, and convicted of an attempt to commit that crime. The evidence was not sufficient to justify his conviction of burglary in the first degree, or of an attempt to commit that offense, but would have justified his conviction of burglary in the second degree. Upon the argument at general term the counsel for the plaintiff in error claimed that a new trial of the plaintiff was forbidden by section 49 (*3 R. S. [6th ed.]*, 995), which provides that when a defendant shall be acquitted or convicted upon an indictment for an offense consisting of different degrees, * * * he shall not thereafter be tried or convicted for a different degree of the same offense, nor shall he be tried or convicted for any attempt to commit the offense charged in the indictment, or to commit any degree of such offense:

Held, that the conviction should be reversed and a new trial ordered (*BRADY, J.*, dissenting, and holding that the conviction should be reversed and the prisoner discharged). (*Sullivan* agt. *People*, 27 *Hun*, 35.)

2. Subdivision 6 of section 465 of the Code of Criminal Procedure confers the power to grant a new trial in criminal cases, when the verdict is contrary to law or clearly against evidence, only upon the court in which the trial was had. No such power is conferred upon an appellate court. (*Sawyer* agt. *People*, 27 *Hun*, 286.)

3. In this case an examination of

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the evidence having shown such a conflict between the witnesses as to create a doubt as to the propriety of the conviction, the general term affirmed the conviction, without prejudice however to a motion to be made in the court of general sessions, where the trial was had, for a new trial. (*Id.*)

NEW YORK (CITY OF).

1. So much of chapter 456 of the Laws of 1881, for the removal of the Forty-second street reservoir, in the city of New York, as provides for the conversion of land into a public park, is unconstitutional, because it is in violation of the third article of the state constitution, which declares "that no private or local bill which shall be passed shall embrace more than one subject and that shall be expressed in the title." So much of the act as relates only to the removal of the reservoir cannot be saved, because, standing alone, it merely orders, without cause, the destruction of valuable property, and hence is not in the line of legitimate and intelligent legislation. (*Webb et al. agt. The Mayor, etc., et al., ante, 10.*)

2. The corporation of New York, by virtue of its ancient charters, confirmed by the constitution, is the owner in fee simple of the lands in question, and the legislature has no power to order the demolition of the structure thereon, except for public purposes and upon making just compensation. Though doubtless competent, when the British rule ceased, for the state to take away from the city of New York its property, rights and privileges, yet not having done so, and having recognized such rights by the Constitution of 1777, and having become amenable to the provisions of the Constitution of the United States of 1787, by which it was prohibited to pass any law impairing

the obligations of contracts, it is not competent for the state, under cover of exercising political powers, to take away the city's vested rights of property. Such rights are as indestructible by legislative act as are the property rights of citizens. (*Id.*)

3. A person running regular trips with a steamboat from One Hundred and Twenty-ninth street, North river, to Fort Lee, New Jersey, under a coasting license, when a ferry has been established from One Hundred and Thirty-second street to Fort Lee, is attempting to use a ferry franchise which the corporation of the city of New York has the exclusive right to grant; and an injunction will lie to restrain such persons from interference and competition with such ferry franchise. (*The Mayor agt. Longstreet, ante, 80.*)

NUISANCE.

1. An action may be maintained by the people of the state, through the attorney-general, for the removal of an alleged nuisance, and for an injunction restraining its continuance. (*The People agt. Metropolitan Telephone and Telegraph Company, ante, 120.*)

2. Where an action in which both legal and equitable relief is demanded in the complaint, is directed to be tried at a circuit court, and the jury have passed upon the questions of fact, it is appropriate and competent for the circuit judge to render a judgment, not only for the damages found by the jury, but also restraining the defendant from the further continuance of the nuisance. (*Id.*)

3. If there is any evidence, however slight, tending to prove the plaintiff's cause of action, the rule is that it is not within the power of the court to dismiss the complaint

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- or order a nonsuit. Nor can the court grant a nonsuit on the assumption that the plaintiff's witness is not to be believed. Furthermore, in determining the propriety of a nonsuit, the court is legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduces to prove, although their correctness may be controverted by the defendant's witnesses. (*Id.*)
4. While it may be lawful and proper for a telegraph company to erect and construct a telegraph line through the streets of a city, it must be constructed so as not to incommode the public use of the street, and the fixtures and poles erected must be necessary. (*Id.*)
 5. In an action brought by the attorney-general in behalf of the people against a telegraph company for the purpose of obtaining both legal and equitable relief, to wit, to restrain and abate the alleged nuisance, and for damages for the injury alleged to have been sustained therefrom:
Held, that if the plaintiffs should succeed in establishing, to the satisfaction of the jury, that the poles in question do incommode the public use of the street in an unnecessary and unreasonable manner, not warranted by the statute, the plaintiff will be entitled at least to recover nominal damages, and a nonsuit is properly denied if the evidence shows that the plaintiff is entitled to recover even nominal damages. (*Id.*)
 2. Under the Code of Civil Procedure, the people are necessary parties to an action to try the title to an office. The rule is the same where the title is to be tried indirectly, as in an action to enjoin the incumbent. Section 1948 expressly provides that such an action must be brought in the name of the people of the state. (*Id.*)
 3. An office is not the property of an individual, but of the people. They have an interest in the exercise of its functions, and no court should without giving them an opportunity to be heard, undertake to decide what individual must possess its emoluments and discharge its duties even for a single hour. (*Id.*)
 4. Where a person usurps or "intrudes" into a public office, civil or military, and the attorney-general brings his action to oust him, no injunction can be obtained *pendente lite*; nor can a party who, as is conceded, has no right to bring an action to test the title, obtain a relief (i. e., an injunction) which the people cannot be afforded. (*Id.*)

ORDER.

OFFICE AND OFFICER.

1. Prior to the adoption of the present Code of Civil Procedure, it was well settled that the title to a public office in this state could only be tried in an action brought in the name of the people of the state by their attorney-general. (*Morris* agt. *Whelan*, ante, 109.)
2. After the settlement of a general term order, and the taxation of costs, the entry of judgment follows, as a matter of course, in conformity to the order, no notice or entry of judgment being required. (*Caro* et al. agt. *Metropolitan Elevated Railroad Co.*, ante, 224.)
2. After the settlement of a general term order, and the taxation of costs, the entry of judgment follows, as a matter of course, in conformity to the order, no notice or entry of judgment being required. (*Caro* et al. agt. *Metropolitan Elevated Railroad Co.*, ante, 225.)

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2. The special term cannot pass upon the question whether a general term order expresses the intent of the court. (*Id.*)

PARTIES.

1. An action may be brought by a receiver of a national bank against its directors to recover damages sustained by it, through gross negligence and inattention to their duties, at least when no proceeding is pending under the national bank act for the forfeiture of its charter. (*Drinkerhoff agt. Bostwick*, 88 N. Y., 52.)

2. In case the receiver is one of the directors chargeable with neglect of duty, such action may be maintained by the stockholders, and when the stockholders are numerous the action may be brought by one or more in behalf of all. (*Id.*)

3. The bank itself and the receiver, as such, are proper and necessary parties defendant to such an action. (*Id.*)

4. During the pendency of this action, which was upon contract, the claim was assigned to J., who took the assignment at the instigation and request of T. & B., a firm of attorneys, and held it expressly in trust for them, he having no interest therein save as such trustee. J. having died, his administratrix, at the request of T. & B., assigned the claim to the present plaintiff, who took expressly in trust for them, and was thereupon substituted as plaintiff:

Held, that plaintiff was trustee of an express trust within the meaning of the Code of Procedure (sec. 118), and could, therefore, under it maintain the action without joining with him the persons beneficially interested in the claim, and in the absence of any allegation on the part of defendant of equities, set-off or counter-claim against them, their absence as

parties could not harm or embarrass him; also, that the claim, upon the death of J., passed to his legal representatives, and his administratrix could transfer the legal title, and as the transfer to plaintiff was made at the request of the sole beneficiaries, he had a perfect title and a sufficient standing to enable him to maintain the action. (*Westmore agt. Hegeman*, 88 N. Y., 60.)

5. An executor cannot maintain an action for the construction of a clause of a will disposing of real estate, unless he is invested with a trust under the will in reference to the subject-matter of the devise. (*Dill agt. Wisner*, 88 N. Y., 153.)

6. Where a mortgagor, who was personally liable for any deficiency arising on foreclosure of his mortgage, is dead, his personal representatives may be made parties to an action to foreclose the mortgage, and a decree may be rendered therein that the deficiency be paid out of the estate in their hands in due course of administration. (*In re Glacius agt. Fugel*, 88 N. Y., 484.)

7. Under the provisions of the Code of Civil Procedure (sec. 889) prohibiting a party from testifying in his own behalf against an executor, &c., of a deceased person, "concerning a personal transaction or communication between the witness and the deceased person," while a party is prohibited from testifying that any particular communication or transaction did or did not take place personally, between him and the deceased, he is not precluded from testifying to extraneous facts which tend to show that a witness who has testified to such a transaction has testified falsely, or that it is impossible that his statement can be true. (*Pinnney agt. Orth*, 88 N. Y., 447.)

8. The provision of the Code of

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Civil Procedure in regard to amendments (*sec. 738*) does not authorize the striking out of the name of a sole defendant in an action, and the insertion in lieu thereof of the names of other persons as defendants. (*N. Y. S. M. P. Ass'n* *agt. Rem. Ag. Works*, 89 *N. Y.*, 23.)

9. No authority is given by the Code of Civil Procedure to order, on motion of the attaching creditor, a person holding property of one, against whom an attachment has been issued, to deliver it to the sheriff. (*Hall* *agt. Brooks*, 89 *N. Y.*, 38.)
10. An action or proceeding to reduce such property to the possession of the sheriff must be instituted by him in his name or in that of the debtor. (*Id.*)
11. Any person claiming an interest in the personalty of a deceased testator, either as legatee under the will, or as entitled to it under the statute of distributions, may, when the executor claims such interest in his own right bring suit against him to settle the construction and ascertain the validity of the provisions of the will, so far as the plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. (*Wager* *agt. Wager*, 89 *N. Y.*, 161.)
12. An heir at law or devisee, who claims a mere legal estate in real property, where there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. (*Id.*)

PLACE OF TRIAL.

1. The general rule of law, that actions for injuries to real estate must be brought in the forum "*rei sitæ*," was not changed by

the provision of the Code of Civil Procedure (*sec. 983*), in reference to the place of trial of actions relating to real property. (*Oragin* *agt. Lovell*, 88 *N. Y.*, 258.)

PLEADING.

1. Certain lands were granted to defendants by the mayor, &c., of the city of New York, plaintiffs, the grantees covenanting that within three months after they "should be thereunto required by the parties of the first part," they would construct, at their own cost, in accordance with ordinances or resolutions of plaintiffs, such street or streets as fell within the limits of the land conveyed. In 1875 a corporation ordinance was passed directing that curb and gutter stones be set, and sidewalks be flagged, on a certain street embraced within the grant; and another ordinance, subsequently passed, directed that the said street be paved, the work being required in each ordinance to be done under the direction of the commissioner of public works. In an action of ejectment to enforce a forfeiture of the grant for alleged breach of the covenant, in which these facts are alleged in the complaint, and that defendants have not done the work, or any part thereof, although six years have elapsed since they received notice of the ordinances:

Held (sustaining demurrer to the complaint), that to place the defendants in default, the complaint should have at least shown that the street was in a condition to receive the pavements and sidewalks, and that no impediment to the immediate doing of the work proceeded from any act or omission of the plaintiffs; and that notice of the resolutions and ordinances did not amount to the notice or requirement mentioned in the covenant, as the ordinances did not direct that the work was required to be done by the

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- defendants. (*The Mayor, &c., agt. Smith, ante, 89.*)
2. Where a paper served as an answer is clearly an answer and demurrer, the defendant may be compelled to elect whether he will abide by his answer or demurrer. (*Bernard agt. Morrison, ante, 108.*)
 3. The defendant alleged that the plaintiff, who was keeping a hotel, "kept no accommodations, and a person could not get a decent meal or decent bed if he tried."
Held, that the words were actionable *per se*. (*Trimmer agt. Hiscock, 27 Hun, 864.*)
 4. The defendant admitted in his answer that the plaintiff was the keeper of a public inn or hotel, which he kept for profit and to enable him to support himself and his family:
Held, that he was concluded by his answer from claiming upon the trial that the action could not be maintained because the plaintiff had failed to procure a license to keep a hotel as provided by chapter 419 of 1877. (*Id.*)
 5. To justify a decision that a demurrer is frivolous, it must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection and indicates that it was interposed in bad faith; if any argument is required to show that the demurrer is bad, it is not frivolous. (*Cook agt. Warren, 88 N. Y., 37.*)
 6. Where a word used in a pleading has two different meanings, one the result of judicial or statutory definition, the other of inaccurate popular use, the latter can only be adopted in construing the pleading where it plainly appears from other averments or the whole tenor of the pleading that such was the sense in which it was employed. (*Id.*)
 7. In an action upon a promissory note the complaint alleged the making of the note by defendant Hammond, the indorsement thereof by the other defendants, its due presentation for payment, a demand and refusal, and then added: "Whereupon the said note was then and there duly protested for non-payment, of all of which the said Hammond had due notice." There was no averment that notice of protest was given to the indorsers. The indorsers demurred:
Held, that the complaint was defective, and an order directing judgment on the ground of the frivolousness of the demurrer was error; that the averment that the note was duly protested was not a sufficient allegation of notice to the indorsers; and that the averment of notice to the maker tends to exclude the idea of an intention to aver notice also to the indorsers. (*Id.*)
 8. It is not essential that a separate count in an answer setting forth a counter-claim should contain in itself all the allegations requisite to a perfect counter-claim; it may refer to other parts of the answer, or to the complaint, and the matters thus referred to are to be considered a part of the count as if written at length therein. (*Cragin agt. Lovell, 88 N. Y., 258.*)
 9. Plaintiff's complaint set forth an agreement for the sale, to him, by defendant and her testatrix, "of a certain plantation known as Live Oaks * * * situated in the * * * State of Louisiana," and asked to recover damages for an alleged breach of said agreement. The answer contained several counts or divisions. In the second the plantation is referred to as "Live Oaks mentioned in the complaint;" in the third the defendant denied that the "court had jurisdiction of the subject-matter of this action, as to the claim for damages for improvements * * * to real estate,

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situate in the State of Louisiana." In the fourth, it was alleged that "while the plaintiff was in possession of the said 'Live Oaks' he unnecessarily injured and wasted the said plantation," and defendant asked to counter-claim the damages. Plaintiff demurred to the counter-claim, on the ground "that it appears that the court has no jurisdiction of the subject hereof." The demurrer was overruled upon the ground that the want of jurisdiction did not appear "upon the face of the counter-claim," as required by the Code of Civil Procedure (*sec. 498*) in order to sustain such a demurrer:

Held, error; that it did appear upon the face of the answer that the real estate was situate in another state; and that the court had no jurisdiction of a claim for damages by waste committed on land situated outside of this state. (*Id.*)

10. A counter-claim must be a complete cause of action, existing in favor of the defendant where he asserts it; he cannot avail himself of it if such cause of action is one of which the court wherein the action is pending has no jurisdiction. (*Id.*)

11. The provisions of the Revised Statutes (1 *R. S.*, 740, *sec. 4*), requiring an heir or devisee taking real estate subject to a mortgage, to pay the mortgage, out of his own property, does not require any additional allegations in a complaint which seeks to charge the personal representatives of a deceased mortgagor with any deficiency. (*In re Glacius agt. Fogel*, 88 *N. Y.*, 484.)

12. Plaintiff's complaint, in an action for conversion of personal property, alleged in substance the execution and delivery to plaintiff by W., the then owner, of a chattel mortgage upon the property, a

demand of payment, and that "thereupon, pursuant to said mortgage, plaintiff was entitled to the immediate possession and control of the property so mortgaged and became the owner thereof, and thereupon took the same into his possession," and while lawfully and quietly possessed thereof, that defendant wrongfully took and converted the same. A copy of the mortgage was attached. By its terms, the debt secured by the mortgage was payable on demand. Defendants demurred, claiming that the complaint was defective in not averring that default had been made in the payment of the mortgage:

Held, untenable; that the allegations of ownership and lawful possession were sufficient without setting forth in detail how title was acquired; and also that a default was clearly to be implied from the facts stated. (*Malcolm agt. O'Reilly*, 89 *N. Y.*, 156.)

13. Two policies of fire insurance contained a condition that the company would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied:

Held, error; as although the condition had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages. (*Ellsworth agt. Aetna Ins. Co.*, 89 *N. Y.*, 186.)

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14. Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of the defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage "to the amount of \$20,000." Upon the trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was unauthorized:

Held, untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal (*Code of Civil Procedure*, sec. 783). (*Schultz* agt. *T. A. R. Co.*, 80 N. Y., 242.)

15. Defendant's answer set up a counter-claim for rent due W. for premises other than those on which the damage was done, to which there was no reply. No point was made on the trial in respect to this counter-claim, but subsequently defendant moved to reduce the verdict and judgment by the amount of the counter-claim:

Held, that the court on such motion was justified in taking into consideration the legal objection to the counter-claim; and that the motion was properly denied. (*Mairs* agt. *Manhattan R. E. Ass'n*, 89 N. Y., 498.)

POLICE JUSTICES.

1. Since the enactment of the Penal Code, police magistrates have the right to commit persons for disorderly conduct, in default of bail for good behavior. (*Matter of McMahon*, ante, 285.)
2. The power possessed by police justices under the former statutes to order persons convicted of disorderly conduct to find surety for their good behavior for a period not exceeding twelve months, and to stand committed for a period not exceeding twelve months, in default of giving surety, has not been affected by the Code of Criminal Procedure, or by the Penal Code. (*Id.*)

PRACTICE.

1. In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, &c., * * * unless the defendant serves, as required by section 1778 of the Code of Civil Procedure, with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of the complaint. (*Hutton et al.* agt. *Morrisania Steamboat Company*, ante, 268.)
2. The service of a copy of such an order is not restricted to cases where defendant's corporation has asked for and obtained an extension of time to answer or demur from this court, but it is necessary in all cases. (*Id.*)
3. A creditor having only an inferior right to administration, dependent on the renunciation or disavowal of the right by all others who had a prior right, must proceed by petition and citation; and since by

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- the Code of Civil Procedure (sec. 2644), it is provided that "the petitioner must pray that all persons having a prior right, who have not renounced, be cited to show cause why administration should not be granted to the petitioner," a creditor cannot take a citation to show cause why administration should not be granted to the public administrator. The proposed administrator, with the will annexed, must himself be a petitioner. (*Matter of Batchelor*, ante, 350.)
4. Section 24 of the general assignment act provides that any act or proceeding commenced or returnable before or instituted or ordered by one judge, may be heard, continued or completed before any other. (*Matter of Sweeney*, ante, 358.)
5. Where, on the return of an order directing the examination of an assignor, he appears on the return day, and the record so indicates, such appearance is presumably before the same judge. The examination of witnesses under this statute (*The General Assignment Act of 1877 and amendments*) rests entirely within the discretion of the court; and applications therefor should be granted only in those cases where benefit will probably result to the assigned estate or those interested therein. (*Id.*)
6. Whether or not the title to a trade-mark, passed under a general assignment is not a question involved on the examination contemplated by the statute. The facts which may control such a proposition, if within the knowledge of the assignor, whose examination is sought, may be properly brought out on such examination. Information upon that subject is proper in aid of the assignment and inquiry is permissible. The Burtnett case (8 *Daly*, 363) distinguished and held to have no application to the one at bar. (*Id.*)
7. The provisions in the order prescribing the scope of the examination should be modified so as to make the examination conform to the foregoing views. (*Id.*)
8. When the notice of appeal from a decision of the surrogate's court to the general term of the supreme court, describing the decree appealed from by its date and title, is perfected, the supreme court acquires jurisdiction of the entire decree, and may reverse the same for errors not mentioned in the petition of appeal. (*See 3 R. S. [6th ed.], 896, secs. 28, 29, 30; Code of Civil Procedure, secs. 2574, 2575, 2584, 2586, 2587, 2589.*) (*Waterman agt. Ball*, ante, 368.)
9. In proceedings instituted for the purpose of inquiring as to the sanity of a citizen, the practice is to present to the court a verified petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind, to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate. A commission thereupon issues to one or more commissioners, who cause a jury to be summoned, before whom the investigation is had. This was the course pursued in this case, and on the hearing before the jury various objections were taken to the admission of evidence, and at the close of the proof counsel for the alleged lunatic insisted upon the right to address the jury on his behalf, which was refused by the commissioner. On motion to confirm:
- Held*, that the refusal of the commissioner to allow the counsel for the alleged lunatic the right to address the jury upon the evidence is error, and fatal to the motion to confirm the findings of the jury. (*Matter of Church*, ante, 398.)

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See ORDER.

Caro et al. agt. Metropolitan Elevated Railroad Co., ante, 224.

See JUDGMENT.

Caro et al. agt. Metropolitan Elevated Railroad Co., ante, 225.

10. It is not necessary for the attorney-general to obtain the leave of the court to bring an action, under section 1948 of the Code of Civil Procedure, against persons assuming to act as a corporation within this state without being duly incorporated. (*People agt. Boston, H. T. and W. R. Co., 27 Hun, 528.*)
11. The court at general term will not reverse upon appeal an order made by the court, under section 1799 of the Code of Civil Procedure, granting leave to the attorney-general to bring an action to procure a judgment vacating the charter, or annulling the existence of a corporation, for one of the reasons specified in section 1798 of the said Code, unless, perhaps, in an extreme case where the complaint is on its face wholly without foundation. (*Id.*)
12. *Quare*, as to what effect the reversal or vacating of an order allowing such an action to be brought would have upon the action if it had already been commenced. (*Id.*)
13. Whether or not notice of the application for the order shall be given to the corporation to be sued rests in the discretion of the court, and its failure to require any notice to be given does not render the order subsequently made invalid. (*Id.*)
14. This action was brought by a firm, consisting of two members, against the defendants, to recover for lumber sold to them. After issue had been joined the plaintiffs died, one in October, 1876, and the other in July, 1877. In December, 1881, the appellants, claiming to have become the owners of the alleged cause of action, moved to have the action revived and continued in their names as the successors in interest of the deceased plaintiffs:
Held, that the motion should have been granted. (*McLachlin agt. Brett, 27 Hun, 18.*)
15. In the notice of appeal from the order denying their motion the appellants inserted their names instead of the names of the original plaintiffs. Upon a motion to dismiss the appeal on this ground:
Held, that it would seem that, under sections 1295, 1296 and 1800 of the Code of Civil Procedure, the appeal might be properly so taken. (*Id.*)
16. That, if this were not so, the court had power, and it was its duty, under sections 723 and 724 of the Code of Civil Procedure, to amend the title by changing it to the original title of the action. (*Id.*)
17. Where, within thirty days from the time of the issuing of an attachment, the defendant appears by an attorney, who serves a formal notice of appearance in his behalf, it is not necessary to serve the summons upon the defendant, either personally or by publication, in the manner required by section 638 of the Code of Civil Procedure. (*Pomeroy agt. Ricketts, 27 Hun, 242.*)
18. In an affidavit, upon which an application for an attachment was based, the cause of action was stated as follows: "The defendants owe my firm one thousand eight hundred and eight dollars and seventeen cents over and above all counter-claims known to plaintiff and to me, for goods, wares and merchandise sold and delivered by my firm to the defendants, who are copartners, and were such during all the times

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herein mentioned, between January 8, 1880, and June 80, 1880. No part has been paid:"

Held, that a cause of action was not stated with sufficient clearness to authorize the issue of an attachment. (*Id.*)

19. It need not appear from the affidavits used upon an application for an attachment that the action has been commenced, or that a summons has been then issued. (*Pickhardt agt. Antony*, 27 Hun, 269.)

20. Under the provisions of the Code of Civil Procedure, an attachment cannot be issued against the property of a defendant, in an action brought simply to recover damages for obtaining goods by false and fraudulent representations. (*Wittner agt. Von Minden*, 27 Hun, 234.)

21. A plaintiff, by noticing for trial an issue of law raised by the service of a demurrer to the complaint, does not waive his right to serve an amended complaint within the time allowed by law. (*Clifton agt. Brown*, 27 Hun, 231.)

22. A creditor's debt must be ascertained and determined by a judgment before he can proceed in equity to collect the same from the equitable assets of the debtor. (*Burnett agt. Gould*, 27 Hun, 366.)

23. To an action of *quo warranto*, brought by the people upon the relation of one claiming to be entitled to an office held by the defendant, the claimant is, under the Code of Civil Procedure, a proper, if not a necessary party plaintiff. (*People ex rel. Petry agt. De Bevoise*, 27 Hun, 596.)

24. By section 548 of the Code of Criminal Procedure it is made the duty of the appellate court, when an erroneous judgment has been entered upon a lawful verdict to correct a judgment in such

manner as to make it conform to the verdict. (*People agt. Griffin*, 27 Hun, 595.)

25. It is no longer proper to remit the case to the trial court to have the proper judgment pronounced, as was required by chapter 226 of 1863. (*Id.*)

26. The costs of an appeal taken from a justice's court before, but heard and decided in the county court after, the Code of Civil Procedure took effect, must be allowed and taxed under section 3070 of the Code of Civil Procedure, and not under section 371 of the old Code.

Costs in the end will be granted or refused in accordance with the law existing when the party has the right to costs. (*Garling agt. Ladd*, 27 Hun, 112.)

27. When a judgment is docketed, upon the decision or order for judgment, without any judgment roll having been made up and filed, the court will set aside an execution thereafter issued upon the judgment docket, unless the defect be cured, and a proper judgment-roll be made up within a reasonable time. (*Blashfield agt. Smith*, 27 Hun, 114.)

28. Where upon an appeal from a decree of a surrogate, denying a petition to compel the payment of legacies, on the ground that the claim is barred by the statute of limitations, the General Term affirms the judgment, it may award costs at the same rate as are allowed upon an appeal from a judgment. (*Cole agt. Terpenning*, 27 Hun, 111.)

29. A judge out of court in any part of the state may make an order staying all proceedings in an action brought in the first judicial district, during the pendency of an appeal taken from an order there made denying a motion to change

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the place of trial. (*Hull* agt. *Hart*, 27 *Hun*, 21.)

30. A national bank can be sued in any state court, having general jurisdiction, in which an individual can be sued for the same cause. It is not necessary to bring the action in the county in which the bank is located. (*Tulmudge* agt. *Third Nat. Bank*, 27 *Hun*, 61.)

31. *It seems*, that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. (*People* agt. *Brooklyn F. and O. I. R. R. Co.*, 89 *N. Y.*, 75.)

32. The attorney-general, in an action brought by him, represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. (*Id.*)

33. Exceptions taken upon the trial of specific questions of fact arising in an equity action and ordered to be answered by a jury should be presented for review before final judgment; they may not be considered on motion for a new trial of the action after judgment. (*Chapin* agt. *Thompson*, 89 *N. Y.*, 270.)

34. On cross-examination of one of the plaintiffs whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception:

Held, no error; that while defendants were entitled to the whole of the letters their remedy was by motion in advance of the

trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. (*Wright* agt. *Cabot*, 89 *N. Y.*, 570.)

35. The court of oyer and terminer has jurisdiction to try an indictment found in the court of sessions of the county without any order of the sessions sending the indictment to the oyer for trial. (*The People* ex rel. *Sherwin* agt. *Mead*, ante, 41.)

36. On an indictment found before the Code of Criminal Procedure took effect, a justice of the supreme court has no power to let one arrested on a bench warrant to bail while a court is in session having jurisdiction to try the indictment. (*Id.*)

37. The statute, prior to such Code, authorizing a district-attorney to issue a bench warrant for the arrest of one indicted, makes no requirements as to the form of the warrant or the matters which shall be stated therein. (*Id.*)

38. The sufficiency thereof must be determined by the common-law rule on the subject. (*Id.*)

39. It is sufficient if the bench warrant clearly indicate the nature of the offense for which the accused stands indicted, and the place and the court in which the indictment is pending. (*Id.*)

40. Sections 301 and 302 of the Code of Criminal Procedure do not, by section 263, apply to indictments found before such Code took effect. (*Id.*)

41. Sections 301 and 302 only apply to the form of a bench warrant to be issued by the clerk, on the ap-

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- plication of the district-attorney, in cases where the prisoner has been let to bail, or has deposited money instead thereof, and has failed to appear in pursuance of his recognizance. (*Id.*)
42. When the district-attorney himself issues the bench warrant, he is not required to follow the form provided in section 801. (*Id.*)
43. Where one is served in the city of New York with a subpoena issued by a court in Albany county, and fails to obey it, he is guilty of a criminal contempt, for which he may be indicted in Albany county. (*Id.*)
44. Personal presence at the place where the crime is perpetrated is not indispensable to constitute an offense. (*Id.*)
45. Failure to attend the court in Albany county impeded and delayed the administration of justice at that place, and the law presumes the accused intended that his behavior should have that effect. (*Id.*)
46. If the return show a valid and sufficient authority for continuing the custody and arrest of the prisoner, it is no ground for reversing an order dismissing a *habeas corpus* that the officer making the return had also arrested the prisoner on other similar warrants. (*Id.*)
47. On *habeas corpus* the officer issuing the writ may inquire whether there was any such indictment as is stated in the bench warrant, and whether the court in which it was found had jurisdiction of the subject-matter. (*Id.*)
48. The question as to the guilt of the prisoner cannot be inquired into on *habeas corpus*. (*Id.*)
49. Where one who has disobeyed a subpoena is proceeded against by indictment for a criminal con-
- tempt, the rules and tests applicable to a civil proceeding to punish such disobedience do not apply. (*Id.*)
50. Civil and criminal proceedings are entirely independent of each other. They may be prosecuted at the same time; and a conviction under one is no bar to a prosecution under the other. (*Id.*)
51. There is no necessity for filing exceptions to a report of a referee who is appointed to take the evidence and report his opinion upon a claim made against an insolvent insurance company. (*Matter of Attorney-General agt. Continental Life Ins. Co., ante, 98.*)
52. The thirtieth rule of the court, as to the necessity of filing exceptions to a referee's report, has no application to a reference of this nature and character. It is only to a reference which empowers a referee to decide questions between parties that the rule is applicable, and it cannot foreclose the court from passing upon matters which such court only has power to determine. (*Id.*)
53. In an action for the foreclosure of a mortgage, where the complaint alleges the giving of a bond, there must be an allegation of default in the performance of the condition of the bond. (*Coulter agt. Bower et al., ante, 182.*)
54. The defendant was indicted in September, 1881, for grand larceny, committed in the preceding month. When arraigned he interposed objections to the finding of the indictment in various forms, all however centering in this, that the grand jury which found the indictment, was drawn from the names of persons selected by the recorder (a local judicial officer) of the city of Albany, and by the supervisors of the several towns (the recorder taking the place of the seventeen supervisors of the

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- city), and from the petit jury list numbering some 2,500 persons, instead of from a list of three hundred persons selected exclusively by the supervisors of the city and county, as required by the Revised Statutes (8 R. & [7th ed.], 2558, sec. 1), and which proceeding in that regard was taken under and pursuant to section 1041 of the Code of Civil Procedure, as amended by chapter 582 of the Laws of 1881, whereas, as was insisted, such amendment was unconstitutional in so far as it provided for the selection of grand jurors in and for the city and county of Albany, as it was a local act within article 3, section 18, of the constitution, which prohibits local laws for selecting, drawing, summoning or impanneling grand or petit jurors. The objections were overruled. A plea of not guilty was entered. On the trial, objection was taken to the petit jury on the same grounds, which were also overruled. Conviction and sentence followed:
- Held*, that the conviction should be affirmed (LEARNED and BOCKES, JJ., concurring; WESTBROOK, J., dissenting). (*The People* agt. *Petrea*, ante, 189.)
55. The Code of Civil Procedure which governs the case provides no way by which such a question can be raised (*Per* LEARNED and BOCKES, JJ.) (*Id.*)
56. A motion to quash, or to set aside an indictment should be made upon affidavits, and the Code prescribes no method of reviewing a decision thereon (LEARNED, P. J.) (*Id.*)
57. There is no constitutional provision which allows a party always to appeal to the highest court, even when his grievance is that a constitutional right has been infringed (LEARNED, P. J.) (*Id.*)
58. The legislature may refuse to give any right of challenge for any fault or error in the preparation of the jury list, provided only that the clerk properly drew the trial jury from the box of ballots prepared by him (LEARNED, P. J.) (*Id.*)
59. There being no way of ascertaining whether chapter 582, of the Laws of 1881, was reported by Code commissioners, except by evidence *abunde* the chapter in question of the acts of the legislature, said chapter cannot be held to be an infraction of the fundamental law, as the constitutionality of laws cannot be permitted to depend on possibly varying decisions of courts and juries on mere questions of fact as to which the legislature had special knowledge (LEARNED, P. J.) (*Id.*)
60. The objections to the indictment were in the nature of a challenge to the array. They went to the entire panel. The mode of presenting the questions is however immaterial (BOCKES, J.) (*Id.*)
61. The Revised Statutes limited challenges to grand jurors to an objection against the prosecutor or complainant serving on the jury, on the theory that the substantial rights of the prisoner would be protected on the trial before the petit jury (BOCKES, J.) (*Id.*)
62. Irregularities in the selection or drawing of grand jurors, not affecting the substantial rights of the accused as regards the question of his guilt or innocence, is not a good ground of challenge to the array (BOCKES, J.) (*Id.*)
63. The recorder, although acting under an unconstitutional law in selecting the list from which the grand and petit jurors were drawn, was, as to the act of selection, a *de facto* officer, and his selection cannot be questioned collaterally; and this rule is not changed because there was no dispute as to the title to his office, the objection

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being to the exercise of additional duties created by a law fundamentally bad. His action had the sanction of an apparent law duly certified to him and to the people of the state (BOCKES, J.). (*Id.*)

64. The paper presented by the defendant was not a plea "to an indictment," and as such controlled by section 832 of the Code of Criminal Procedure. Neither was it a challenge to the array of grand jurors, nor to an individual grand juror, and therefore controlled either as to form or substance. The objection he made was radical; it was aimed at the jurisdiction of the court to place him on trial, and denied that he was indicted, as no grand jury had presented the accusation upon which he was arraigned (WESTBROOK, J.). (*Id.*)

65. The Code of Criminal Procedure cannot be construed as intending to deprive a person of a constitutional right, and if it be capable of any such construction, which it clearly is not, such a barrier would be futile, for it is a legal impossibility by a statute to deprive a party of his right to claim constitutional protection. Under color of legislative enactment, a grand jury cannot be organized in a mode forbidden by the constitution, and prevent, under like color of legislation, the aggrieved party from being heard in assertion of his rights (WESTBROOK, J.). (*Id.*)

66. By section 18 of article 3 of the Constitution, it is declared, "The legislature shall not pass a private or local bill in any of the following cases, * * * selecting, drawing, summoning or impanneling grand or petit jurors," and by section 25 of same article, it is provided "that sections 17 and 18 of this article shall not apply to any bill or the amendment to any bill which shall be reported to the legislature by commissioners who have been appointed pursuant to

law to revise the statutes." These provisions are clear. Chapter 532, of 1881, is not an amendment to a bill, but is an amendment of a law in full force at the time of the passage of the former, and not having been reported by commissioners, is void (WESTBROOK, J.). (*Id.*)

67. It is elementary that a body of men, no matter of whom composed, has, either of its own volition or upon the summoning and call of other than the authority of law, no power to resolve itself into a grand jury, and when professing to be thus organized, to accuse any one, by what it may call an indictment, of an infamous crime and subject him to a trial therefor (WESTBROOK, J.). (*Id.*)

68. It is clearly the prerogative of the court to ascertain and decide whether, in the passage of any bill, a constitutional provision was violated (WESTBROOK, J.). (*Id.*)

69. The authorities have settled these principles: First. That mere irregularities by an officer in doing that which he is authorized to do will not vitiate the thing done. Second. When duties properly and legally belonging to the office of which an individual is in possession have been performed by such incumbent, that which has been thus done will be upheld as to the parties affected thereby, and courts will not, in collateral proceedings, inquire into the right of the individual to hold the office and to discharge the duties which lawfully appertain to such office (WESTBROOK, J.). (*Id.*)

70. But no such principles are involved in this case. The recorder assumed to do an act not properly appertaining to his office, as the constitution forbade conferring upon him such power by a local law (WESTBROOK, J.). (*Id.*)

71. *Friery* agt. *People* (2 *Keyes*, 424); *Carpenter* agt. *People* (64 *N. Y.*,

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483); *Dolan* agt. *People* (*Id.*, 485; *Cox* agt. *People* (80 *id.*, 500) examined and explained (WESTBROOK, J.). (*Id.*)

72. The ruling of the court below involved one of the most sacred rights of a man — his right to be tried for a crime only after indictment by a grand jury organized according to law. When this prerequisite to a trial and conviction was not obtained, and a human being is in prison, without this safeguard of his rights having been observed, the court should rather stretch than curtail its power to review (WESTBROOK, J.). (*Id.*)

73. Where a case is removed into the United States circuit court after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein. (*Waldman* agt. *Pennsylvania Railroad Company*, ante, 198.)

See MARINE COURT.

Schlegel agt. *American Beer and Ale Bottling Company*, ante, 196.

See RAILROAD CORPORATIONS.

Matter of New York, West Shore and Buffalo Railway Company, ante, 216.

Watson agt. *New York, West Shore and Buffalo Railway Company*, ante, 220.

PRINCIPAL AND AGENT.

1. Where a claim is made by a third party, to money in the hands of an attorney or agent, he is not bound to pay the amount claimed to his principal, unless he is protected against the claim. He must interplead the principal and the claimant, if he can, or he must demand indemnity, and deliver the property to the party who indemnifies him; but if after a notice of a claim by a third party

he pays over the money to his client, he becomes liable, if the claimant has a right to the money. (*Peyser* agt. *Wilcox*, ante, 525.)

2. The reasons stated. (*Id.*)

PROOF.

See EVIDENCE.

Hall agt. *Van Vranken*, ante, 407.

PROHIBITION (WRIT OF).

1. A writ of prohibition is not mandable as matter of right, but of sound judicial discretion. (*People ex rel. Adams* agt. *Westbrook*, 89 N. Y., 152.)

2. An order of the General Term of the Supreme Court, therefore, denying the writ is not reviewable here. (*Id.*)

3. It seems, that the writ should be issued only in cases of extreme necessity and not for grievances which may be redressed by ordinary proceedings at law, or in equity, or by appeal. (*Id.*)

4. The history of the writ in England stated, and the authorities collated. (*Id.*)

PROMISSORY NOTE.

See CORPORATIONS.

Hulson et al. agt. *Morrisania Steamboat Company*, ante, 268.

RAILROAD CORPORATIONS.

1. Though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its corporate funds in the purchase of the stock of another corporation is

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not necessary in the exercise of any of its corporate powers, and is unauthorized and in violation of the statute and is consequently *ultra vires*. (*Milbank et al. agt. New York, Lake Erie and Western Railroad Company*, ante, 20.)

2. While a railroad corporation remains the owner of the stock of another corporation it may collect and receive dividends thereon, and has the right to sell and dispose of the same, but has no right to vote thereon; and the stockholders of the company, whose stock is thus held, have the right to have the company holding such stock enjoined from so voting, in case it threatened to do so. (*Id.*)

3. In proceedings to acquire title to real estate under chapter 140 of Laws of 1850, where the petition stated that the company "is a corporation organized under and in pursuance of the laws of the states of New York and New Jersey for the purpose of constructing," &c., and then goes on to state how and under what laws it is organized:

Held, that this is a sufficient compliance with the statute which requires the petition to state, in effect, that the company is duly incorporated. (*Matter of New York, West Shore and Buffalo Railway Company*, ante, 216.)

4. The act (*Laws of 1869, chap. 917*) authorizing consolidation gave the successor all the rights of every description belonging to the predecessor, and consequently an allegation in the petition that one of the predecessors (naming it) of this company made and filed the proper map, &c., is a sufficient compliance with the statute. (*Id.*)

5. It is not necessary to give in the petition a history of the negotiations, or to state the evidence from which is derived the fact of

inability to agree by reason of an excessive price being asked. When the reason stated is in substance that the price asked by the owners is excessive, it is sufficient. (*Id.*)

6. An objection that a second application should not be granted without special cause shown therefor, is not a preliminary objection. This is a matter to be raised and disposed of at the trial. (*Id.*)

7. The statute does not require separate petitions for lands needed for the route, and for lands needed for operating the road, nor to postpone the application for the latter until the former is obtained. (*Id.*)

8. Whether or not, under the amendment of 1876, the company must tender the amount of the former award before renewing the proceeding, is a question to be determined at the trial. (*Id.*)

9. Where defendant commenced proceedings under this statute (*Laws of 1850, chap. 140*) to acquire for the purposes of its railroad certain real estate of the plaintiff, and commissioners were appointed who made their report; and on application of the defendant upon notice to plaintiff, an order was made that the proceedings be abandoned and discontinued on payment by defendant to the attorneys of the plaintiff of certain costs and expenses, the amount being fixed in the order. The amount as fixed has been tendered, but refused. The report was directed to be filed, but its confirmation was denied without prejudice. The present action is brought to obtain either the confirmation of said award and its payment by the defendant to the plaintiff, or the payment by defendant to plaintiff of his costs and expenses in the matter, which are alleged to be \$5,000. On motion by plaintiff for an injunction order restraining the defend-

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ant from taking any other proceedings to condemn said lands during the pendency of said suit, and also restraining it from entering into or taking possession of the property, and requiring it to restore certain portions of it to its original conditions:

Held, that as the case now stands a preliminary injunction restraining further proceedings by the company under the statute would not be proper.

Held, further, that as the opposing affidavits show that the defendant has not entered into possession of any of plaintiff's property, and does not intend to until authorized by law, the moving papers not showing a very serious injury in this regard, an injunction order would not be appropriate.

Held, also, that the necessity of a mandatory injunction order of restoration as to a certain portion of the property should appear very clearly, and the facts in this case do not require it. (*Watson agt. New York, West Shore and Buffalo Railway Company, ante, 320.*)

RECEIVERS.

1. A receiver may be appointed in an action brought in the second judicial district by a stockholder residing there, of a corporation having its office and place of business in the first judicial district. (*Smith agt. Dansig et al., ante, 320.*)
2. And this is so, notwithstanding the provision of rule eighty-one of the general rules of practice that "such appointment must be made in the judicial district in which the principal place of business of such corporations is situated." (*Id.*)
3. The supreme court is an entire tribunal, and whenever a suitor in pursuance of a statutory right

invokes its powers, it is bound to perform its duties, and if the appointment of a receiver happens to be a part of its duty, it is not the office of a mere rule to abridge its powers or work a denial of justice in the premises. (*Id.*)

4. A rule of court, in order to be valid, must be consistent with the Code, and rule eighty-one is not in harmony with the statutory right of a party to locate the venue of his action in the county where he resides. (*Id.*)
5. If any complaint is to be made against a receiver it should be made in the action and district in which he was appointed. (*Id.*)

REFEREE.

1. Where an action brought to foreclose a mortgage has been referred, and the evidence upon the trial has been taken by a stenographer, whose fees have been taxed by the plaintiff in the disbursements, the court may, in its discretion, under sections 83 and 84 of the Code of Civil Procedure, order the plaintiff, when the stenographer's notes are in his possession, to file the same with the county clerk, even though the property has been sold and the judgment and costs fully paid. (*Horrocks agt. Thompson, 27 Hun, 144.*)

REFEREE'S FEES.

1. Application by a receiver, who has been removed from his receivership, to procure payment of his compensation—the fees of a referee appointed to report as to the amount of such compensation must be first paid by the said receiver if he is the party in whose favor the report is made. (*See Attorney-General agt. Continental Life Ins. Co., 27 Hun, 534.*)

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REFERENCE.

1. There is no necessity for filing exceptions to a report of a referee who is appointed to take the evidence and report his opinion upon a claim made against an insolvent insurance company. (*Matter of Attorney-General agt. Continental Life Insurance Company, ante, 93.*)
2. The thirtieth rule of the court, as to the necessity of filing exceptions to a referee's report, has no application to a reference of this nature and character. It is only to a reference which empowers a referee to decide questions between parties that the rule is applicable, and it cannot foreclose the court from passing upon matters which such court only has power to determine. (*Id.*)
3. The provisions of the Revised Statutes (3 R. S. [6th ed.], 96, 97, secs. 47, 48) providing for the reference of disputed claims against the estate of a deceased person must be fully and strictly complied with. If any of the proceedings thereby required be not taken the judgment entered upon the report of the referee will be void. (*Burnett agt. Gould, 27 Hun, 366.*)
4. Where, in proceedings by reference to assess defendant's damages by reason of a temporary injunction, no damages for which plaintiff is liable are shown, he cannot be required to pay the expenses of the reference. (*Randall agt. Carpenter, 88 N. Y., 293.*)
5. Upon a reference under the statute (3 R. S., 88, sec. 86), of a disputed claim against the estate of a deceased person, neither the referee nor the court has power to render an affirmative judgment against the claimant upon a counter-claim in favor of the personal representative; they can only avail themselves of a set-off or counter-claim to the extent necessary to extinguish the demand of the

claimant. (*Mowry agt. Peet, 88 N. Y., 458.*)

6. As to whether they can divide their claim by so setting off a part and bringing action for the residue, *quære*. (*Id.*)
7. So, also, *quære* as to the effect of a judgment in favor of the claimant if the counter-claim is withheld or withdrawn and afterward an action brought thereon. (*Id.*)
8. Such a reference is not an action but a special proceeding. (*Id.*)
9. Where a referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law. (*Bonnell agt. Griswold, 89 N. Y., 122.*)

REMOVAL OF CAUSE.

See PRACTICE.

Waldman agt. Pennsylvania Railroad Company, ante, 193.)

REVIVAL OF ACTION.

1. This action was brought to recover a debt owing by one Theodore Martine. Martine having died, the action was revived and continued against the executors and trustees named in his will. Subsequently the plaintiff, fearing that the personal estate might prove insufficient to pay any judgment that might be recovered, applied to have the action extended by having the devisees made parties defendant to it:
Held, that the application was properly denied, as, if granted, it would in effect authorize the joinder of two distinct and divisible causes of action.
That the fact that the statute of limitations might prove to be a defense to a separate action brought

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against the devisees did not affect the propriety of the denial of such a motion. (*Greene agt. Martine*, 27 Hun, 246.)

2. This action was brought by a firm, consisting of two members, against the defendants, to recover for lumber sold to them. After issue had been joined the plaintiffs died, one in October, 1876, and the other in July, 1877. In December, 1881, the appellants, claiming to have become the owners of the alleged cause of action, moved to have the action revived and continued in their names as the successors in interest of the deceased plaintiffs: *Held*, that the motion should have been granted. (*McLachlin agt. Brett*, 27 Hun, 18.)

RULE 81.

1. A receiver may be appointed in an action brought in the second judicial district by a stockholder residing there, or a corporation having its office and place of business in the first judicial district. (*Smith agt. Danaig et al.*, ante, 320.)
2. And this is so, notwithstanding the provision of rule eighty-one of the general rules of practice that "such appointment must be made in the judicial district in which the principal place of business of such corporation is situated." (*Id.*)
3. The supreme court is an entire tribunal, and whenever a suitor in pursuance of a statutory right invokes its powers, it is bound to perform its duties, and if the appointment of a receiver happens to be a part of its duty, it is not the office of a mere rule to abridge its powers or work a denial of justice in the premises. (*Id.*)
4. A rule of court, in order to be valid, must be consistent with the Code, and rule eighty-one is not in harmony with the statutory right of a party to locate the venue of

his action in the county where he resides. (*Id.*)

SERVICE BY PUBLICATION.

1. An affidavit on which an order for service of a summons by publication is asked, which is entirely on information and belief as to the non-residence of the defendant, without stating the ground of deponent's information, is insufficient. (*Lyon agt. Baxter*, ante, 426.)
2. An order for the publication of a summons must be founded upon a verified complaint, showing sufficient cause of action against the defendant to be served. (*Williamson agt. Williamson*, ante, 450.)
3. Where a complaint was verified before a commissioner for the state of New York residing in Philadelphia, and no certificate of the secretary of state of the state of New York, certifying to the genuineness and official signature of the commissioner, was attached to the alleged verification: *Held*, that such a complaint is not a verified complaint, and the justice who made the order for publication never acquired any jurisdiction to make this order. (*Id.*)
4. Upon an application made under sections 488 and 489 of the Code of Civil Procedure to procure an order for the service of the summons by publication upon a non-resident defendant, the affidavit alleged "that deponent knows the defendants personally, and knows that they are not residents of this state, but reside at Lynn, in the state of Massachusetts, and have engaged in business there under the firm name and style of J. Mahon & Sons. The plaintiff will be unable, with due diligence, to make personal service of the summons herein upon the defendants within this state:"

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Held, that the affidavit was sufficient to give the court jurisdiction over the matter. (*Smith agt. Mahon*, 37 Hun, 40.)

5. That a motion made by a subsequent attaching creditor to vacate an attachment granted in the action, upon the ground that the said affidavit was insufficient to sustain an order for the service of the summons by publication subsequently made therein, should be denied. (*Id.*)
6. *Quare*, as to whether the order would have been sustained if the motion had been made by the debtor himself. (*Id.*)
7. Under the Code of Procedure a money judgment against a non-resident upon whom there was no personal service of summons, but service was made by publication, and who did not appear in the action, cannot affect any property of the defendant except such as has been taken by virtue of an attachment regularly issued in the action. (*McKinney agt. Collins*, 88 N. Y., 216.)
8. The words "subject of the action" in the provisions of said Code (*sec. 135, subd. 8*) in reference to service by publication requiring it to be established before jurisdiction is given to grant an order for service upon a non-resident that "the court has jurisdiction of the *subject of the action*," are not identical with "cause of action," but are intended as words of qualification or limitation; they relate not to an action at law but to a suit in equity, the object of which is to give some specific relief rather than a simple judgment against property. (*Id.*)
9. Accordingly *held*, that a sale of real estate belonging to the defendant under an execution issued in an action against a non-resident wherein the service of the summons was by publication, and no

attachment had been issued, gave no title to the purchaser. (*Id.*)

10. Under the provisions of the Code of Civil Procedure in reference to service of summons by publication (*secs. 440, 441, 787*), such service is not complete until the expiration of at least six full weeks from the time of the first publication, or, when service is made out of the state, until the expiration of that period after such service. (*Market Nat. Bk. agt. Pacific Nat. Bk.*, 89 N. Y., 897.)
11. Where, therefore, after the granting of an order of publication, summons was served on defendant out of the state on November 25, 1881, and judgment by default was entered January 20, 1882:
Held, that the judgment was premature; and that an order setting it aside was properly granted. (*Id.*)

SHERIFFS.

1. The method of adjustment, by taxation, of sheriff's fees on execution applies only to such items as are prescribed by law; it has no application to an item the amount of which depends upon agreement. (*McKeon agt. Horsfall*, 88 N. Y., 429.)
2. Upon such a taxation, therefore, the sheriff is not entitled to an allowance for "auctioneer's" fees or for "keeper's" fees, save "where an execution has been staid after levy," and under the provisions of the Code of Civil Procedure (*sec. 8307, subd. 7*), an allowance has been made by "the court or a judge thereof" to the sheriff "for his trouble and expense in taking care of and preserving the property." (*Id.*)
3. In an action against a sheriff for an escape of one held in custody under an execution, where that officer justifies under an order of

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the county judge, discharging the prisoner, if it appears that the judge had jurisdiction over the subject-matter and the person of the debtor and that the statutory requirements in regard to such an application were substantially complied with, the discharge is valid and the defense is established. (*Goodwin* agt. *Griffis*, 88 N. Y., 629.)

4. If the order itself recites the necessary jurisdictional facts it is sufficient; if it omits any essential facts the sheriff may show its existence by proof *aliunde*. (*Id.*)

5. In such an action the sheriff may set up as a defense that the execution under which the judgment debtor was imprisoned was illegally issued, and that the arrest was unauthorized and void. (*Id.*)

6. *It seems*, that where the process is erroneous, and so voidable simply and not void, the sheriff cannot set up the defects. (*Id.*)

See CONSTITUTIONAL LAW.

The People ex rel. McEwan agt. *Keeler*, ante, 478.

SPECIFIC PERFORMANCE.

1. In an action for specific performance of a contract of sale of real property, the plaintiff's title to the premises being through a foreclosure of a mortgage by advertisement; the mortgagor was not served with the notice, but died pending the proceedings, leaving a widow and one child. The widow was served with the notice. No administrators of decedent's estate was appointed:

Held, that the title tendered by the plaintiff is not such as a court of equity ought to compel the defendant to accept. (*Mackenzie* agt. *Alster*, ante, 888.)

2. The death of the mortgagor and the non-appointment of an admin-

istrator does not render the service of a notice of sale unnecessary. The court has no power to dispense with a positive provision of a statute. (*Id.*)

3. Where the party who applies for a specific performance has omitted to execute his part of the contract, by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay or where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. (*Babcock* agt. *Emrich*, ante, 485.)

4. Where in an action for specific performance of an agreement to convey land it appeared that the time for performance had been extended by the seller, and on the adjourned day the purchaser requested an adjournment because of inability to find his lawyer, the seller thereupon gave the purchaser time to get his lawyer or procure other counsel, but upon the purchaser's return without a lawyer and his request for another adjournment, the seller tendered the deed and demanded the purchase-money, and where on the evening of the next day the plaintiff called on defendant Emrich (the seller) and offered to perform, and the latter refused to perform:

Held, that by the refusal of the purchaser to perform when the tender was made the contract was rescinded, and that this action cannot be maintained. (*Id.*)

5. The court will take judicial notice that lawyers are not so scarce in the city of New York that one cannot be found to attend to such a matter in the course of several hours. (*Id.*)

SPECIAL PROCEEDINGS.

1. The power of this court to award a commission, without the consent

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of parties, to take the testimony of a witness out of this state, depends entirely on statute, and can only be exercised in the cases therein specified. (*Champlin agt. Stodart, ante, 878.*)

2. The provisions of the Code of Civil Procedure, in reference to taking depositions out of this state (*secs. 887 et seq.*), relate to actions only. (*Id.*)
3. Supplementary proceedings are special proceedings, and a commission cannot be issued to take the testimony of a foreign witness in such proceedings. (*Id.*)

STATUTE OF FRAUDS.

1. In order to constitute a delivery and acceptance of goods something more than words are necessary; and the fact that the goods are already in the defendant's possession under a prior understanding does not amount to a delivery or acceptance. There must be some affirmative act of his to take the case out of the statute. (*Duplex Safety Boiler Company agt. McGinness, ante, 99.*)

STAY OF PROCEEDINGS.

1. A relator for *habeas corpus* who is remanded to custody on a bench warrant, and desires a stay under sections 2045, 2046, 2061, 2062 of the Code of Civil Procedure, pending an appeal to the court of appeals, must himself personally execute the recognizance within the jurisdiction of the court. (*The People ex rel. Sherwin agt. Mead, ante, 252.*)

STREET OR PARKS IN CITIES.

1. The rule is, that where a conveyance is bounded upon a street or

highway in the absence of any expression, showing a contrary intent, the grantor will be deemed to have intended to convey the fee to the center line of the street or highway. If, however, it is bounded by the easterly or westerly or the exterior bounds, or commences and runs from some fixed monuments so as necessarily to cause the line to run on the exterior line of the street or highway, so that it is apparent that it was the intention of the grantor to reserve to himself the fee of the highway, there the deed must be construed accordingly. It is a question of intent to be determined from the reading of the instrument. (*Foster agt. City of Buffalo, ante, 127.*)

2. Another rule is, that where the owner of land in a city lays out a street through, or a park in it, and then sells off lots on either side, bounded thereon, the purchasers are entitled to have the space of ground laid out left open forever for their use and enjoyment. (*Id.*)
3. Where, as in this case, the Holland Land Company (who formerly was the owner of most of the land now embraced in the city of Buffalo); in the year 1814 laid out this open space and named it Cazenovia terrace, and it ever since has been kept open and used as a public street and park, the plaintiffs and their grantors in making their purchases understood that the same was so laid out and dedicated for that purpose: *Held*, that even if it be conceded that the plaintiffs who are the present owners of some portion of the land abutting on said terrace, are not the owners of the fee of the lands embraced within the terrace, they are the owners of an easement therein, of which they cannot be deprived except by a voluntary conveyance, or by the taking of the same under the rights of eminent domain. (*Id.*)

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4. The city is not the owner of the fee of the lands embraced within the terrace and on which it proposes to erect the building; and until it acquires the fee, or extinguishes the easement, it has no right to take and occupy the same for any other purpose than that for which the lands were originally dedicated. (*Id.*)

SUMMARY PROCEEDINGS.

1. When the time of a justice is required and devoted to other business, having precedent demands upon him as a member of the court, he is reasonably excusable for not entertaining an application by a landlord to remove a tenant under the statute relating to summary proceedings. (*The People ex rel. Cavanagh* agt. *McAdam*, ante, 238.)
2. While the language of the act is mandatory in its terms, it could not have been intended to deprive the justice of the discretion vested in judicial officers. (*Id.*)
3. The allowance of the writ of *madamus* is discretionary, and the discretion will not be exercised against a judicial offer in such a case. (*Id.*)

SUMMONS.

1. Where a warrant of attachment is granted in an action against two joint defendants, a service of the summons upon one of the defendants within thirty days is sufficient compliance with the provision of the Code in that regard (*Orvis* agt. *Goldechmidt et al.*, ante, 71).
2. That the notice subjoined to the summons was not subscribed by the attorney, and omitted to state the day of the month on which the order for substituted service

was made, were not fatal or jurisdictional defects. (*Id.*)

3. Under the provisions of the Code of Civil Procedure in reference to service of summons by publication (*secs. 440, 441, 787*) such service is not complete until the expiration of at least six full weeks from the time of the first publication, or when service is made out of the state, until the expiration of that period after such service. (*Market Nat. Bk.* agt. *Pacific Nat. Bk.*, 89 *N. Y.*, 397.)

4. Where, therefore, after the granting of an order of publication, summons was served on defendant out of the state on November 25, 1881, and judgment by default was entered January 20, 1882:
Held, that the judgment was premature; and that an order setting it aside was properly granted. (*Id.*)

SUPERIOR COURT.

1. The superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and the objection to the jurisdiction of the court may be taken at any time, although it has not been taken in the answer. (*Brooks et al.* agt. *Mexican National Construction Company*, ante, 364.)

SUPPLEMENTARY PROCEEDINGS.

1. The power of this court to award a commission, without the consent of parties, to take the testimony of a witness out of this state, depends entirely on statute, and can only be exercised in the cases therein specified. (*Champion* agt. *Stodart*, ante, 378.)
2. The provisions of the Code of Civil Procedure, in reference to

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taking depositions out of this state (*secs. 887 et seq.*), relate to actions only. (*Id.*)

3. Supplementary proceedings are special proceedings, and a commission cannot be issued to take the testimony of a foreign witness in such proceeding. (*Id.*)

4. By the by-laws of the "New York Cotton Exchange" a seat in the exchange, the right to which is evidenced by a certificate of membership, is transferable by assignment of the certificate to members under certain prescribed rules and restrictions:

Held, that such a right was property, and as such passed to a receiver appointed in supplementary proceedings on execution against the owner; and that the receiver had a right to redeem the seat when it had been pledged by the judgment debtor as collateral for a loan. (*Powell agt. Waldron, 89 N. Y., 323.*)

SURETYSHIP.

See UNDERTAKING.

Manning agt. Gould, ante, 429.

TAXATION.

1. The capital stock of a corporation is properly assessed at its actual and not its par value. (*The People ex rel. Panama R. R. Co. agt. Commissioners of Taxes, ante, 405.*)

TELEGRAPH COMPANIES.

1. An action of ejectment may be maintained by the owner of lands against a telegraph company for the removal of poles which have been set by such company on the side of the road in front of plaintiff's lands and residence without first having made compensation.

Dusenbury agt. Mutual Union Telegraph Company, ante, 206.)

2. Under the act of 1853 (*Laws of 1853, chap. 471*) amending the act of 1848, providing for the incorporation and regulation of telegraph companies, such companies cannot enter upon and use lands (which includes public roads, streets, and highways) without first compensating the owner or owners thereof. It must make payment precede appropriation. (*Id.*)

TELEGRAPH POLES.

See NUISANCE.

The People agt. Metropolitan Telephone and Telegraph Company, ante, 120.)

TOWN BONDS

1. A judgment of a county judge, under chapter 907 of the Laws of 1869, as amended by chapter 925 of Laws of 1871 (providing for the issue of town bonds for railroad stock), which adjudges and determines that petitioners do represent a majority of the taxpayers of the town, as shown by the last preceding tax list or assessment-roll, and do represent a majority of the taxable property upon said list or roll becomes conclusive, unless action is taken to review such proceedings within sixty days after the last publication of notice of the judge's final determination. (*Cathoun agt. Delts and Middletown Railroad Company, ante, 291.*)

2. The whole scheme of the act is, that the bonds are to issue, provided a majority of the taxpayers and property ask for it. Whether or not such majority have so asked, the county judge is to decide, and such decision, when made, conclusively establishes the

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only fact which gives authority for their issue. (*Id.*)

8. Where such judgment has been unchallenged for eleven years, it will not in a collateral action, be adjudged void for want of a literal and exact compliance with the statute, in the form of the petition presented, when the right to render the judgment sought does not depend upon such petition alone, but upon the fact that a majority of taxpayers, representing a majority of the property of the town, desired the issue of the bonds. (*Id.*)

4. The act of 1871 was passed May twelfth and took effect immediately. The petition was framed under the act of 1869, and was presented May 6, 1871. It omitted to state what the act of 1871 has been held to require, viz.: "That the petitioners constitute a majority of the taxpayers of the town appearing on the last preceding assessment-roll, not including those taxed for dogs or highway tax."

Held, that the proceeding is not void for the failure to state this fact. The true construction is, that from the time the act of 1871 was passed it became the law as to all proceedings thereafter, whether then pending or commenced subsequently, while all that had been done before was supported by the first act, and must be judged by it. The judgment cannot be assailed upon the ground that it was not based upon a proper petition, because it was based upon a petition entirely proper and sufficient at the time it was acted upon. (*Id.*)

5. The petition specified "The Delhi and Middletown Railroad Company," which it further described as "an association in said county and state," as the company sought to be aided:

Held, that this was sufficient. There can be no objection to the use of the word "company," or

that it was styled "an association" and not a corporation. (*Id.*)

6. It is insisted that the adjudication of the county judge was void for want of a sufficiently verified petition. That there were nineteen petitioners instead of one; that some of those differed from others, and that only one was verified:

Held, that the several papers constituted, really, only a single petition, and were handed to the county judge at the same moment. Upon one of such papers was a verification by one of the petitioners, and it was for the county judge to decide from the evidence before him whether or not such verification extended to all the names appended to the several headings, and if he decided it did, the parties aggrieved should have sought their remedy under the act. In any event, however, the one paper verified as the statute required, and averring every fact which such act makes necessary, gave to the county judge jurisdiction to act. Its averments may have been untrue, but of such truth or untruth that officer was to judge, and though he found it untrue, he was still authorized, if sufficient other taxpayers consented at the time of the hearing, to render the judgment authorized by the act. (*Id.*)

7. Where the notice published by the county judge, upon the presentation of the petition, did not state the place where the county judge would be found upon the return day, but did designate the day, the time of the day, the month and year of the hearing:

Held, that in so doing it specified all that either the act of 1869 or 1871 required. In the absence of any designation of a place of hearing, that which the county judge ordinarily occupied for the transaction of business would be intended, and of its locality the taxpayers must be presumed to have been acquainted. (*Id.*)

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8. Where it was conceded that the adjudication was made and directed to be entered of record, and that it was "entered" in the proper clerk's office, there is nothing wanted to make the record complete. (*Id.*)

9. Where it was insisted that the adjudication was void because the county judge did not, as the act of 1871 requires, publish notice of his final determination, "for three weeks at least, once in each week, in the same newspaper in which notice of such hearing was published as ordered:"

Held, that the law does not make the validity of the judgment depend upon the publication, but upon the fact that it has been rendered. The want of publication does not invalidate the judgment, though it may lengthen the time for the allowance of a *certiorari* to review the proceedings. (*Id.*)

10. Corporations, municipal or other and their taxpayers or stockholders, may, as private individuals in the conduct of their affairs, so conduct themselves as to be estopped from questioning the authority of a person who has assumed to act in their behalf; and the recognition and adoption by them of acts professed to have been done for them may bind them as effectually as the conferring of the power so to do prior to their being done. (*Id.*)

11. Where a large number of the taxpayers of a town, and professing to be a majority thereof, representing a majority of its property, asked the county judge of the county in which the town was situated for a judgment and action which would permit the issue of the bonds, such judge assuming to act in conformity with the requirements of the law, after notice, determined and adjudged that a majority of taxpayers and property had petitioned for the issue of such bonds, which judgment

was entered of record; such judge appointing commissioners to issue the obligations of the town, which obligations were issued, and contained recitals showing their regularity, and assuming that all necessary and legal action had been taken to make them valid and binding upon the town; neither the municipality nor any taxpayer, since the rendition of such judgment and the appointment of commissioners, sought to review such judgment or to prevent the issue of the bonds, either of which could readily have been done, and for ten years, twice during the year, the interest has been paid upon the bonds thus issued by the proper officer of the town, its taxpayers, without objection, paying the amount levied upon them for that purpose:

Held, that the doctrine of acquiescence is applicable to this case, and because of such acquiescence, both by the town and its taxpayers, in the validity of the bonds, such acquiescence amounting to an actual adoption of them as the legal acts of the town, such town and its taxpayers are estopped from questioning their validity (LEARNED, J., dissenting). (*Id.*)

TRADE-MARK.

1. Plaintiffs invented a name for certain puzzles or games and applied thereto the names of "sliced animals," "sliced birds," and "sliced objects:"

Held, upon motion to continue injunction, that these names were arbitrary fancy names and the proper subject of a trade-mark. (*Selchow et al. agt. Baker et al., ante, 212.*)

TRIAL.

1. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate who was killed at a highway crossing,

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the court charged in substance that from a point the proper distance from the crossing until the locomotive reached the crossing, it was defendant's duty either to ring a bell or blow a whistle, and do it continuously so as to give warning. To this portion of the charge defendant's counsel excepted generally:

Held, untenable; that the charge was substantially correct; but even if the court erred in using the word "continuously," a portion of the charge being correct, a general exception could not be sustained; that if any qualification was proper and desired it should have been suggested. (*Smadis* agt. *B. and R. B. R. R.*, 88 *N. Y.*, 18.)

2. At the close of the evidence, defendant's counsel presented to the court fifteen separate requests to charge; as to most of these the court charged substantially as requested, and at the conclusion of the charge, declined to charge, except as already charged, to which refusal as to each of the requests said counsel excepted:

Held, untenable; that if the court erred in refusing to charge one or more of the propositions presented, there was no sufficient exception, the exception should have been more specific, pointing out the particular request to which it was intended to apply. (*Id.*)

3. In an action against a carrier for non-delivery of goods, although the allegation is a negative one, if put in issue, the burden of proof is upon the plaintiff, and he must give some evidence of non-delivery, according to the obligation assumed by the carrier, before the latter can be called upon to prove delivery. (*Roberts* agt. *Chittenden*, 88 *N. Y.*, 83.)
4. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate who was killed at a highway crossing, the court charged in substance

that defendant had a right to travel over its road at pleasure, and at such a rate of speed as it saw fit, but that circumstances might make the exercise of such right an element of negligence; that great speed was not necessarily negligence, but in connection with other facts and circumstances might tend to establish it:

Held, no error. (*Salter* agt. *U. & B. R. R.*, 88 *N. Y.*, 42.) *

5. The court charged that if the course pursued by the deceased was one which persons of prudence and self-possession would adopt under the same circumstances, he was not negligent in so doing; that the standard by which his conduct was to be judged was that of an ordinary careful, prudent man:

Held, correct. (*Id.*)

6. The comments of the trial court in its charge upon the testimony are not ordinarily the subject of legal exception, so long as the questions of fact are left with the jury, with instructions that they are the sole judges thereof. (*Sindram* agt. *People*, 88 *N. Y.*, 196.)

7. As to whether such comments may not be carried so far as to afford ground for assigning error, *quare*. (*Id.*)

8. D., plaintiff's intestate, was an engineer in the service of defendant, who was operating a railroad; while running the train, D.'s engine was derailed, and he received injuries causing his death. In an action to recover damages, plaintiff's evidence tended to show that the track was defective at the place of derailment; the evidence upon this point was conflicting. Defendant proved without dispute that the flange of one of the wheels of the locomotive was broken at the time of the accident, and that the fracture was due to an undiscoverable flaw. The court refused a motion to dismiss

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the complaint, and left it to the jury to determine whether the derailment was caused by the defects in the track or the breaking of the wheel, charging them that if the death of D. was caused by the latter plaintiff could not recover:

Held, no error. (*Durkin* agt *Sharp*, 88 N. Y., 225.)

9. Defendant requested the court to charge that "if the jury believe that the track had been inspected within a reasonable time prior to the accident by a competent inspector of the defendant, and had been by him adjudged to be in safe condition, the plaintiff cannot recover." The court refused so to charge:

Held, no error; that to excuse defendant from liability, the track must have been carefully inspected by a competent inspector; a careless performance of this duty would not excuse. (*Id.*)

10. The rejection of evidence sought to be drawn out by defendant on the cross-examination of a witness for the plaintiff, which evidence would tend to support the defense, but was not called forth by any part of the direct examination, is not a ground of error; it is within the discretion of the court to receive the evidence at the time, or to require the defendant to wait until plaintiff has rested before introducing it. (*Neil* agt. *Thorn*, 88 N. Y., 270.)

11. When evidence is erroneously rejected, the error is cured by the subsequent offer by the same party of the same evidence and the admission thereof, in case it appears that the error was so corrected under circumstances which worked no injury to the party. (*Id.*)

12. A witness once summoned and called to testify upon a trial is presumed to be present until its conclusion. (*Id.*)

13. *It seems*, that where it appears that a witness examined for the plaintiff has left the court, and when wanted by defendant is not present, it is in the discretion of the court to suspend the trial until he can again be brought in. (*Id.*)

14. As to whether if this is refused, the defendant can have the benefit of an exception, *quære*. (*Id.*)

15. Plaintiff's complaint alleged in substance that defendants, maliciously intending to injure him, brought him before a justice of the peace, and, without probable cause, charged him with having, by certain specified false pretenses, obtained from defendant F. his signature to a written instrument, by means of which plaintiff procured from one T. a sum of money with intent to cheat and defraud, and thereupon defendant procured the justice to grant a warrant for plaintiff's arrest, and under it he was arrested and imprisoned; that having examined defendants and their witnesses in relation to the charge, the justice acquitted the plaintiff. Then followed a clause stated to be "as a separate cause of action," alleging that defendants maliciously and wrongfully caused plaintiff to be put into the custody of a constable, and forced him to go before the justice, and "then caused him to be imprisoned on a false charge;" damages were claimed for malicious prosecution and false imprisonment. The facts as to the complaint, arrest and discharge were undisputed, and plaintiff gave evidence tending to show that the charge was maliciously made. The court charged, "this is an action for malicious prosecution. There is also in the complaint a charge for false imprisonment, but it all arises out of the same transaction. If there is a cause of action for malicious prosecution, there is also one for false imprisonment. If

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the whole thing was justifiable, then there is neither."

Held, that while, in the strict and technical sense, evidence to sustain an action for false imprisonment would not sustain one for malicious prosecution, yet as the complaint, in fact, contained but one cause of action, *i. e.*, malicious prosecution, which included the arrest, and as the statement in no way subjected defendants to increased damages, there was no error authorizing a reversal. (*Id.*)

16. In an action against highway commissioners for negligence in not guarding one side of a bridge by a railing, in consequence whereof M., plaintiff's intestate, fell from the bridge and was injured, plaintiff offered to show that they erected a railing the day after the accident; this was not offered generally, but for the expressed purpose of proving, first, that defendants exercised control over the bridge; second, that they had sufficient funds at the time of the accident to construct the railing; the court received it when offered for the first of these declared purposes, but reserved the question as to its competency for the second purpose until the evidence was closed; it was then decided, the case stating that the evidence "was allowed and considered upon the question of defendant's negligence," and exception was taken:

Held, that the ruling was, not that the evidence was competent upon the issue of negligence generally, but only that it was admissible for the purpose so expressed; and that the ruling was not error. (*Morrell* *agt. Peck*, 68 *N. Y.*, 858.)

7. As a general rule the interference of the court with counsel, when opening a case to a jury, is a matter of discretion, the exercise of which is not the subject of exception. (*Walsh* *agt. People*, 88 *N. Y.*, 458.)

18. *It seems*, that it is only when some person attempts to resist the operation of an act claimed by him to impair the obligation of a contract, and calls in the aid of the judicial power to pronounce it void as to him, his property or rights, that the objection of unconstitutionality can be presented and sustained. (*People* *agt. Brooklyn, etc., R. R. Co.*, 89 *N. Y.*, 75.)

19. The attorney-general, in an action brought by him represents the whole people and a public interest. No question can be presented in such action affecting only mere individuals and private rights. (*Id.*)

20. Two policies of fire insurance contained a condition that the company would not be liable "for any loss or damage occasioned by neglect to use all possible efforts to save and preserve the property." The complaint, in an action upon the policies, after setting out a loss, averred that it was not occasioned by "neglect to use all possible efforts by the plaintiffs to save and preserve the property." The answer put this allegation in issue. On the trial, evidence having been given tending to show a breach of the condition, the court was requested by defendant's counsel to charge substantially in the words of the condition; this was denied:

Held, error; as although the condition had not been set up as a defense, issue as to its breach had been tendered in the complaint; also the question was one which affected the amount of damages. (*Ellsworth* *agt. Aetna. Ins. Co.*, 89 *N. Y.*, 186.)

21. On trial at Special Term of an action, to redeem a certificate of membership in the New York Cotton Exchange, defendant demanded a trial by jury. This was denied, and a judgment directing a transfer of the certificate to plaintiff was rendered:

Held, that a refusal of the de-

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- mand was not error, as the action was an equitable one, and the effect of the ruling was to make it impossible to turn it into an action at law and compelled plaintiff to stand or fall in equity; also that the demand did not deny or challenge the equitable jurisdiction; and as no motion was made to dismiss the complaint or for judgment on the ground that no equitable cause of action had been shown, and as no exception was taken to the findings of law or fact, the defendant, by not objecting, submitted to the equitable jurisdiction and the question could not be considered here. (*Powell* agt. *Waldron*, 89 N. Y., 828.)
22. On cross-examination of one of the plaintiffs, whose testimony was taken by commission, he was requested to annex copies of any correspondence with E. & C. S. He annexed extracts from and not the whole of the letters. On the trial plaintiffs read these extracts under objection and exception:
Held, no error; that while defendants were entitled to the whole of the letters, their remedy was by motion in advance of the trial either to have the execution of the commission corrected by annexing the full letters or striking out the extracts, or to suppress the deposition; and not having taken that remedy they must be held to have assented to the mode in which the commission was executed. (*Wright* agt. *Cabot*, 89 N. Y., 570.)
23. Where there has been no opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the return, no objections because of such imperfect execution will be heard on the trial. (*Id.*)
24. Improper evidence should be objected to when offered, if received without objection court not bound to charge jury to disregard it. (*See Bradner* agt. *Strang*, 89 N. Y., 209.)
25. Where, although question to witness is too broad, the answer is confined to precise issue, there is no error. (*See Wright* agt. *Cabot*, 89 N. Y., 570.)
26. Where upon trial parol evidence is given without objection as to terms of contract, in addition to a written contract, and the question as to where the contract was, is thus submitted as a question of fact, and there is evidence sufficient to sustain a verdict, it is conclusive here. (*See DeBevoise* agt. *P. and S. S. Co.* [*Mem.*], 80 N. Y., 614.)
27. Where, in an action to recover the purchase-price of an article, the defense was that the purchase was conditioned upon the article working well, the court charged that the fact that defendant did not return the article was no error. (*Id.*)

TRUST.

1. The testator, who left no children, gave certain real and personal estate to his widow (who has since died) in lieu of dower, in which was included an estate for life in four houses in Fifth avenue. With the exception of four specific devises in fee, he devised certain portions of his estate to his executors for the use of various persons designated, during their respective lives, with a remainder in fee as to each portion. He then gave the residue of his estate, which comprised the Fifth avenue property, to his executors, with power to mortgage it, and, after paying taxes and other expenses, to divide the remainder, at any time within ten years, to the legatees named in his will (except his servants) in like proportions to their previously specified legacies. Eighteen specific devises of a life estate and remainder in fee, in several parcels of land in different localities, constitute the basis of the intended distribution:

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Held, that though the provision giving the executors the right to mortgage the residuary estate and make distribution of the surplus of proceeds thus realized, within ten years, does not unlawfully suspend the power of alienation, yet, as in order to make division in the proportions named, the value of ninety-seven parcels of land must not only be ascertained, but also the value of the estate of each life tenant, and of the estate in remainder in fee, and also of such as may have died or may thereafter be born, such a distribution as is contemplated would be impracticable and uncertain, and the subject of the trust is too indefinite to be enforced, and the trusts should be declared void. (*Weeks et al. agt. Cornwell et al.*, ante, 276.)

2. The testatrix, desiring to devote the bulk of her estate to the furtherance of religious, educational and benevolent objects, and being apprised of the difficulty of legally reaching the ends proposed through express provisions in her last will and testament, made in her will an absolute and unconditional gift of her residuary estate to three persons, leaving also a letter of instructions to these residuary devisees and legatees. In this letter, which is not attested and is not referred to in the will, she said she relied upon them, immediately upon her decease, to take such measures as might be necessary to accomplish her wishes. She had been told that the devisees and legatees could spend every dollar in any way they saw fit, and that she must rely on their good faith and sense of right. The plaintiffs brought this action to set aside the residuary clause in the will, claiming that the letter of instructions is to be construed together with the will, and that the whole form part of one plan to accomplish an illegal purpose, and that the devisees and legatees of the residuary estate take the same under unlawful and void

trusts, and therefore, so far as the residuary clause is concerned, it is a fraud upon the heirs at law and next of kin:

Held, that the secret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a devise and bequest. (*O'Hara agt. Dudley et al.*, ante, 840.)

See WILL.

Odell agt. Youngs, ante, 56.

, TRUSTEES.

See CORPORATIONS.

Sheldon Hat Blocking Co. agt. Eickemeyer Hat Blocking Machine Co., ante, 467.

TRUST DEED.

1. The defendant corporation gave a first mortgage on its property and franchises, in which it was provided that \$12,500 of the surplus of its net earnings, after paying interest on the bonds secured by the mortgage, should be paid semi-annually to the mortgage trustees, as a sinking fund for the redemption of the bonds. The moneys in this fund, with the accumulations of interest thereon, were to be invested in the purchase of these bonds, if such purchase could be made at not exceeding ten per cent above par, the bonds so purchased to be indorsed as belonging to the sinking fund, and they were to "remain in force" and the interest thereon was to be continued to be paid as part of the capital of the sinking fund. In case the bonds could not be purchased at ten per cent above par, no further payment was to be made to the sinking fund until the price lowered to that point, when such payment of \$12,500 semi-annually was to be resumed. Purchases of bonds were made until January, 1879, when they advanced in value beyond the

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limit imposed. But interest on the bonds held for the sinking fund continued to be paid. In this action, by a preferred stockholder of the corporation, to restrain this payment:

Held (1), that the obligation to pay interest on the bonds in the sinking fund has not by the terms of the mortgage been suspended. (2) The provision of the Illinois statute, that the payments into the sinking fund shall not exceed two per cent of the gross earnings, means that such payment shall not exceed two per cent of the gross receipts of the year in which the payments are made; and at any rate, as the company already had a corporate existence under the laws of Indiana, the provision of the Illinois statute could not affect the terms of the mortgage agreement. (*Wilds* agt. *St. Louis, Alton and Terre Haute Railroad Company*, ante, 418.)

UNDERTAKING.

1. Sureties to an undertaking given on appeal to the general term of the supreme court, or of a superior city court, when excepted to, and they fail or refuse to justify, and justification is not waived by the respondents, are not bound by the condition of their undertaking. (*Manning* agt. *Gould*, ante, 429.)
2. Defendants were sureties upon an undertaking on appeal, and were excepted to; G., learning of his principal's death during the examination, refused to go on or remain on the bond. The other defendant refused to appear. Plaintiff took no measures to complete the examination. In an action on the undertaking:
Held, that defendants were not bound by its conditions. (*Id.*)
3. In an action originally commenced against two members of a firm

upon a firm indebtedness, the defendants gave an undertaking to discharge an attachment, and thereafter a plea in abatement having been interposed, the attorney for the original parties stipulated for the amendment of the summons and complaint, so as to bring in, as defendant, another, a partner in the firm. The summons was amended without the order of the court, or the consent of the sureties in the undertaking, by inserting the name of the third defendant, who voluntarily appeared in the action, and judgment was recovered against all three of the defendants. In an action upon the undertaking:

Held, that the amendment was not, in effect, the commencement of a new action, but simply the continuance of the old one; that the judgment, although it included the added defendant, was a judgment against the original defendants within the meaning of the undertaking; and so, that defendants were liable. (*Christal* agt. *Kelly*, 88 N. Y., 285.)

4. Also, *held*, that the fact that the summons was amended without the order of the court did not affect the validity of the judgment (2 R. S., 425, sec. 7; *Code of Civil Proc.*, sec. 731); and the parties, having consented to the amendment, could not object on the ground that no order was procured. (*Id.*)
5. The court allowed a certified copy of the attachment to be given in evidence under an objection that it had not been shown that the attachment had been granted:
Held, that the evidence was immaterial, as the undertaking recited the issuing of an attachment, and that was sufficient proof of the fact. (*Id.*)
6. Defendant excepted to the reading in evidence of the original summons and complaint which were attached to the judgment-

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roll, on the ground that they formed no part of the record:

Held, untenable; that they were admissible to show the identity of the action with that described in the undertaking, and assuming they were not properly a part of the record, their admission in connection with it was error. (*Id.*)

7. The answer in the original action was withdrawn, and judgment entered by the clerk as upon default. It was objected that the record contained no proof of a personal service of summons, and this was essential to authorize such an entry. The judgment recited an appearance by the defendant:

Held, that the objection was untenable, as a voluntary appearance was equivalent to personal service. (*Id.*)

8. Counsel fees, incurred by defendant for services in an action other than those made necessary by a temporary injunction therein, cannot be assessed as damages upon the undertaking given on granting the injunction. (*Randall* agt. *Carpenter*, 88 N. Y., 298.)

9. So, also, fees for services of counsel in unsuccessfully resisting the allowance of the injunction are not allowable as damages by reason of the injunction. (*Id.*)

10. Where, in proceedings by reference to assess defendant's damages by reason of a temporary injunction, no damages for which plaintiff is liable, are shown, he cannot be required to pay the expenses of the reference. (*Id.*)

USURY.

1. A legatee, devisee or executrix of a "borrower," is not a "borrower," within the usury laws, and cannot maintain an equitable action for relief against a usurious

mortgage, without a tender before suit brought of the sum borrowed. (*Buckingham* agt. *Corning*, ante, 508.)

2. The rule of the construction of this statute examined and explained. (*Id.*)

VERIFICATION.

1. In an action by the drawers of a draft against the acceptor thereof, the complaint was verified by one of the plaintiff's attorneys. At the end of the verification, which was in the usual form, were added these words: "That said action is founded upon a written instrument for the payment of money only now in deponent's possession for collection, which said instrument is the source of deponent's information and belief."

Held, that the verification was sufficient; that it was not necessary that it should state why the verification was made by the attorney instead of the party. (*Hyde* agt. *Salg*, 37 Hun, 310.)

WARRANTY.

1. In an action for the recovery of damages under an alleged breach of warranty:

Held, that upon the question as to whether there was a warranty or not, the plaintiff has the burden and must establish it by furnishing the preponderance of evidence. (*Raines* agt. *Totman*, ante, 498.)

2. When the plaintiff swears unqualifiedly and explicitly to a warranty and the defendant as unqualifiedly and explicitly swears there was not, and there is no evidence in the case corroborating the plaintiff, he fails to make out a case of warranty and defendant is entitled to judgment. (*Id.*)

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WILL.

1. Where a trust attempted to be created in a will is void from suspending the absolute power of alienation for more than two lives in being, the fact that the persons named died during testator's lifetime does not cure the invalidity of the devise. (*Odell agt. Youngs, ante, 56.*)
2. A power of sale given to executors, though its exercise as to a dwelling-house was made dependent by a succeeding paragraph upon the wife's consent, was valid, that provision having been made nugatory by her death. (*Id.*)
3. Where a specific provision by the testator in his will, for his wife, inconsistent with a right in the widow to demand a third of the land to be set off to her, she must make her election, though the testator does not in terms declare that such provision is to be taken by her in lieu of dower. (*Young et al. agt. Boyd, ante, 218.*)
4. Where the testator by his will clothed his executor with a power of sale of all his estate, real and personal, in such form as to work an equitable conversion of the realty into personalty, and vest them with the title to all the property, the income of a portion of the proceeds of the estate when sold to be paid to the widow for life, the remainder of the proceeds being absolutely disposed of, the widow cannot take both dower and the provision made for her by the will, the claim of the one being inconsistent with and repugnant to the other. (*Id.*)
5. The testator, who left no children, gave certain real and personal estate to his widow (who has since died) in lieu of dower, in which was included an estate for life in four houses in Fifth avenue. With the exception of four specific devises in fee, he devised certain portions of his estate to his executors for the use of various persons designated, during their respective lives, with a remainder in fee as to each portion. He then gave the residue of his estate, which comprised the Fifth avenue property, to his executors, with power to mortgage it, and, after paying taxes and other expenses, to divide the remainder, at any time within ten years, to the legatees named in his will (except his servants) in like proportions to their previously specified legacies. Eighteen specific devises of a life estate and remainder in fee, in several parcels of land in different localities, constitute the basis of the intended distribution:
Held, that though the provision giving the executors the right to mortgage the residuary estate and make distribution of the surplus of proceeds thus realized, within ten years, does not unlawfully suspend the power of alienation, yet, as in order to make division in the proportions named, the value of ninety-seven parcels of land must not only be ascertained but also the value of the estate of each life tenant, and of the estate in remainder in fee, and also of such as may have died or may thereafter be born, such a distribution as is contemplated would be impracticable and uncertain, and the subject of the trust is too indefinite to be enforced, and the trusts should be declared void. (*Weeks et al. agt. Cornwell, ante, 276.*)
6. The testatrix, desiring to devote the bulk of her estate to the furtherance of religious, educational and benevolent objects, and being apprised of the difficulty of legally reaching the ends proposed through express provisions in her last will and testament, made in her will an absolute and unconditional gift of her residuary estate to three persons, leaving also a letter of instructions to these

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residuary devisees and legatees. In this letter, which is not attested and is not referred to in the will, she said she relied upon them, immediately upon her decease, to take such measures as might be necessary to accomplish her wishes. She had been told that the devisees and legatees could spend every dollar in any way they saw fit, and that she must rely on their good faith and sense of right. The plaintiffs brought this action to set aside the residuary clause in the will, claiming that the letter of instructions is to be construed together with the will, and that the whole, form part of one plan to accomplish an illegal purpose, and that the devisees and legatees of the residuary estate take the same under unlawful and void trusts, and therefore, so far as the residuary clause is concerned, it is a fraud upon the heirs at law and next of kin:

Held, that the secret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a de-

vise and bequest. (*O'Hara agt. Dudley et al.*, ante, 840.)

See DEED OF SETTLEMENT.

Kinnan agt. Guernsey, ante, 253.

WITNESSES.

1. Under the provision of the Code of Civil Procedure (*sec. 829*) prohibiting a party from testifying in his own behalf against an executor, etc., of a deceased person, "concerning a personal transaction, or communication between the witness and the deceased person," while a party is prohibited from testifying that any particular communication or transaction did or did not take place personally between him and the deceased, he is not precluded from testifying to extraneous facts which tend to show that a witness who has testified to such a transaction has testified falsely, or that it is impossible that his statement can be true. (*Pinney agt. Orth*, 447.)

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Ex. 4. a. 3.

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